89- 1582

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

**STATE OF CONNECTICUT,
DEPARTMENT OF HUMAN RESOURCES,
WAYNE H. CAMILLIERI, JACK I. WINKLEMAN,**
Petitioners,

v.

**UNITED STATES MERIT SYSTEMS
PROTECTION BOARD,**
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners

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QUESTIONS PRESENTED

Whether in these cases, *the first time that the United States Merit Systems Protection Board ever ordered that funding be withheld a State*, the application of the provisions of 5 U.S.C. §§ 1501, et seq. ("Hatch Act"), to attempt to bar two State of Connecticut employees from being political candidates, to attempt to remove them from employment, and to impose a financial penalty of $151,046 against the State of Connecticut, was a violation of the Constitution as follows:

(a) Whether recent cases applying strict scrutiny in matters involving political activity require that strict scrutiny be applied in adjudicating First Amendment and equal protection issues raised in Hatch Act cases?

(b) Whether the application of the Hatch Act resulting in a significant financial penalty to the State of Connecticut for honoring the constitutional rights of its employees violated the Tenth Amendment by seriously intruding into the State's internal affairs?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, State of Connecticut, Department of Human Resources, Wayne H. Camillieri and Jack I. Winkleman, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this case on January 12, 1990.

OPINIONS OF THE COURTS AND ADMINISTRATIVE AGENCIES BELOW

The judgment and opinion of the United States Court of Appeals for the Second Circuit is unreported. A copy of the judgment and opinion is printed in the Appendix. App. 1A-3A.[1]

The memorandum of decision of the United States District Court for the District of Connecticut (Cabranes, J.) of July 24, 1989 is reported at 718 F.Supp. 125 (D. Conn. 1989). A copy of the opinion is printed in the Appendix. App. 4A-21A. The District Court directed the entry of judgment in that decision. Judgment was entered on July 26, 1989 and is printed in the Appendix. App. 68A-69A.

In the cases involving Wayne H. Camillieri, the Recommended Decision of the Chief Administrative Law Judge of the United States Merit Systems Protection Board has not been officially reported. That Recommended Decision is printed in the Appendix. App. 22A-33A. The Board's Final Decision and Order is reported at 33 M.S.P.R. 565 (1987) and is printed in the Appendix. App. 34A-38A. The Board's Order and Certification for withholding of funding is reported at 35 M.S.P.R. 167 (1987) and is printed in the Appendix. App. 39A-45A.

In the cases involving Jack I. Winkleman, the Recommended Decision of the Chief Administrative Law Judge of the United States Merit Systems Protection Board has not been officially reported. That Recommended Decision is printed in the Appendix. App. 46A-54A. The Board's Final Decision and Order is reported at 36 M.S.P.R. 71 (1988) and is printed in the Appendix. App. 55A-60A. The Board's

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[1] In this petition, the abbreviation "App." refers to the Appendix, and the abbreviation "R." refers to the Record filed with the United States Court of Appeals for the Second Circuit, whenever these abbreviations are used.

Order and Certification for withholding of funding is reported at 36 M.S.P.R. 692 (1988) and is printed in the Appendix. App. 61A-67A.

JURISDICTION

The judgment and the opinion of the United States Court of Appeals for the Second Circuit were made and entered on January 12, 1990 and copies are printed in the Appendix. App. 1A-3A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 5 U.S.C. § 1508. This petition is filed within the ninety days of the judgment of the Court of Appeals allowed by 28 U.S.C. § 2101(c).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the following constitutional, statutory and regulatory provisions: U.S. Const. Amend. I; U.S. Const. Amend. V; U.S. Const. Amend. X; U.S. Const. Amend. XIV, § 1; 5 U.S.C. § 1501, et seq.; Conn. Gen. Stat. § 5-266a, et seq.; and Regulations of Connecticut State Agencies § 5-266a-1. The text of said provisions is reproduced in the Appendix, in accordance with U.S. Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

This petition arises from four civil actions filed in the United States District Court for the District of Connecticut seeking judicial review of decisions of the United States Merit Systems Protection Board (hereinafter "Board"), pursuant to 5 U.S.C. § 1508. The District Court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 1508.

In the underlying proceedings, the Board determined that the provisions of 5 U.S.C. § 1501, et seq. ("Hatch Act")

were violated by the political activities of Wayne H. Camillieri and Jack I. Winkleman, that the violations "warranted removal" from state employment, and ordered that funding be withheld the State of Connecticut in the total amount of $151,046[2] for failing to remove Camillieri and Winkleman from employment within thirty days of the Board's decisions. The petitioners asserted before the Board that the contemplated application of the Hatch Act violated the First Amendment, Tenth Amendment and constitutional guarantee of equal protection of the laws. These constitutional assertions were renewed before the District Court.

All four cases were consolidated before the District Court. Following cross-motions for summary judgment, judgment was entered in favor of the Board. The petitioners appealed the District Court decision to the United States Court of Appeals for the Second Circuit. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 5 U.S.C. § 1508. After consideration of the appeal, the decision of the District Court was affirmed. The facts with respect to Wayne H. Camillieri and Jack I. Winkleman are as follows:

1. As to Wayne H. Camillieri

Since 1983, Wayne H. Camillieri's formal job title at the Connecticut Department of Human Resources was Human Resources Chief of Social Work Services. R. 33, Joint Stipulation of Facts ("JSF"), ¶ 1.[3] From January 1985 until November 1985, his functional job title was Acting Chief, Fair Hearing Unit ("FHU"). R. 33, JSF, ¶ 2.

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[2] The Board's withholding order recognized that it was issued "[i]n this case of first impression." 33 M.S.P.R. 167, 172 (1987); App. 38A. This represented the *first time* that the Board issued an order withholding funding from a State.

[3] The Joint Stipulation of Facts was filed while administrative proceedings involving Camillieri were still pending before the Chief Administrative Law Judge of the United States Merit Systems Protection Board.

In January 1985, Camillieri was assigned duties in connection with the FHU following efforts by DHR to identify a role for him, unrelated to federally funded activities. DHR's efforts were limited by state law considerations preventing a transfer to a noncomparable or lower ranking position. DHR's judgment was that an assignment in connection with the FHU presented less involvement with federally funded activities than any other assignment that was possible for him. R. 33, JSF, ¶ 3.

As Acting Chief of FHU, Camillieri was responsible for training and supervising examiners who, in turn, heard and decided administrative appeals filed by individuals and groups wishing to participate in social service programs administered by DHR. R. 33, JSF, ¶ 4. In 1985, the FHU performed duties involving state and federally funded social service programs. R. 33, JSF, ¶ 5.

In 1985, the FHU reviewed appeals filed by aggrieved parties of initial determinations made elsewhere in DHR. Camillieri did not conduct hearings nor did he schedule hearings. Neither he nor any of the hearing officers under his supervision had any discretion to diverge from the policy of DHR in the course of performing duties nor did they have authority to set the policy that they administered. R. 33, JSF, ¶ 6.

Camillieri spent slightly more than half of his time on state funded programs and the remaining time in connection with federally funded programs. Of the time that he spent in connection with federally funded programs, approximately half was spent training the hearing officers with respect to the proper method for conducting hearings under the Connecticut Uniform Administrative Procedures Act. R. 33, JSF, ¶ 7.

As FHU supervisor, Camillieri had authority to review and revise examiners' written hearing decisions to insure that conclusions of fact and law were consistent with hearing records. In practice, he only returned decisions to examiners for grammatical corrections. R. 33, JSF, ¶ 8.

Camillieri was a candidate in a partisan primary election conducted on September 10, 1985. R. 33, JSF, ¶ 13. During his candidacy he remained employed as Acting Chief of FHU, DHR. R. 33, JSF, ¶ 16.

2. As to Jack I. Winkleman

Throughout 1986, Jack I. Winkleman served as a Human Resource Development Senior Representative with DHR's Monitoring and Evaluation Division. In that position, he reviewed and evaluated the management and effectiveness of community and social service programs funded in large part by federal monies. R. 3, JSF, ¶ 2.[4] Throughout 1986, Winkleman spent a substantial amount of time performing review, evaluation and monitoring duties in connection with federally funded programs such as the Community Service Block Grant and the Social Service Block Grant. R. 3, JSF, ¶ 3.

Winkleman was the Republican candidate for Judge of Probate in Wallingford, Connecticut's general election on November 4, 1986. R. 3, JSF, ¶ 15. During his candidacy he remained employed as a Human Resource Development Senior Representative with DHR's Monitoring and Evaluation Division. R. 3, JSF, ¶ 16.

[4] The Joint Stipulation of Facts was filed while administrative proceedings involving Winkleman were still pending before the Chief Administrative Law Judge of the United States Merit Systems Protection Board.

REASONS FOR GRANTING THE WRIT

THE QUESTION OF WHETHER THIS COURT'S PREVIOUS DECISIONS INVOLVING THE HATCH ACT[5] REMAIN VIABLE IN LIGHT OF THIS COURT'S REASONING IN A SUBSEQUENT LINE OF CASES[6] IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. Whether Strict Scrutiny Ceases To Apply When Considering Whether The Application Of The Hatch Act To Political Activity By State Employees Is Unconstitutional.

The issue in this case is whether First Amendment protections that have developed for political speech cease to apply when the political activity of state employees is evaluated under the Hatch Act. The Hatch Act provides that: "A State or local officer or employee may not . . . (3) be a candidate for elective office." 5 U.S.C. § 1502(a).[7] By its very language, the Hatch Act purports to prohibit State employees from being candidates for elective office. In this case, Wayne Camillieri was a candidate for nomination to the Hartford, Connecticut City Council. R. 33, JSF, ¶ 13. Jack Winkleman was the Republican candidate for Probate Judge in the Wallingford, Connecticut general election. R. 3, JSF, ¶ 15. The

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[5] *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *State of Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127 (1947); *U.S. Civil Service Commission v. National Ass'n. of Letter Carriers*, 413 U.S. 548 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601 (1974).

[6] *Buckley v. Valeo*, 424 U.S. 1 (1976); *Tashjian v. Republican Party of Connecticut*, ___ U.S. ___, 107 S.Ct. 544 (1986); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, ___ U.S. ___, 107 S.Ct. 616 (1986).

[7] "State or local officer or employee" is defined to be "an individual whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency. . . ." 5 U.S.C. § 1501(4).

record of administrative proceedings before the Board is totally devoid of any evidence suggesting that either employee engaged in any political activity on State time or were in any way influenced in their public duties by considerations of machine politics.

After considering charges by the Special Counsel, the United States Merit Systems Protection Board determined that the Hatch Act was violated simply by these employees being candidates. Those determinations were appealed both by the employees concerned and by the State and are encompassed by this petition. Upon the State's failure to discharge the employees within thirty days of the Board's determination that the Hatch Act was violated, the Board issued orders withholding a total of $151,046 from the State of Connecticut. Those orders were also appealed and are encompassed by this petition. This represented the *first time* that the Board ever issued a withholding order to a State.

The four cases in the District Court that lead to this petition collectively presented the question of whether the application of the Hatch Act to the facts of the cases violated the First Amendment, Tenth Amendment and the equal protection guarantee of the Fifth Amendment.[8] These issues concern the individual constitutional rights of the employees, the State being penalized for honoring the constitutional rights of its employees by declining to fire them,[9] and the sovereign rights of the State of Connecticut to be free from

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[8] Governmental action which, if perpetrated by the states, violates the Equal Protection Clause of the Fourteenth Amendment, violates the Due Process Clause of the Fifth Amendment if perpetrated by the Federal Government. *Richardson v. Belcher*, 404 U.S. 78, 81 (1971); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

[9] "It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech. *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972)." *Rankin v. McPherson*, ____ U.S. ____, 107 S.Ct. 2891, 2896 (1987).

improper interference by the federal government in the State's internal affairs.

In their decisions, both the District Court and the Court of Appeals felt constrained by this Court's previous decisions involving the Hatch Act, notwithstanding the rationale utilized in court decisions involving political activity subsequent to its previous Hatch Act cases. The Court of Appeals stated:

> [T]he Supreme Court has recently stated that the lower federal courts are not free to disregard directly applicable Supreme Court precedent on the theory that it has been undermined by that Court's reasoning in another line of cases. *Rodriguez de Quilas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917, 1921-22 (1989).

Order of the Court of Appeals, App. 3A.

The District court stated the identical reservation. *State of Conn., DHR v. U.S.M S.P.B.*, 718 F.Supp. 125, 131 (D. Conn. 1989), App. 15A. The lower federal courts' recognition of the constraints that the *Rodriguez de Quilas* decision placed on their ability to fully address the constitutional issues in these cases leaves to this Court the question of whether recent court decisions involving political activity warrant the determination that the Hatch Act could not be constitutionally applied to the employees involved in this petition.

In its early Hatch Act cases, in 1947, this Court determined that regulation of the political activities of public employees only had to be "reasonable." *United Public Workers v. Mitchell*, 330 U.S. 75, 102 (1947); *State of Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127 (1947). The *Mitchell* case was a 4-3 plurality decision. Justice Black, in dissent, noted:

> [L]aws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public. . . .
>
> * * *
>
> Legislation which muzzles several million citizens threatens popular government, not only because it injures the individuals muzzled, but also, because of its harmful effect on the body politic in depriving it of the political participation and interest of such a large segment of our citizens.

Mitchell, 330 U.S. at 110–111 (Black, J., dissenting).

In 1973, the Court again had the opportunity to address the constitutional implications of the Hatch Act. In the cases of *U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court declined to determine that the Hatch Act, and a similar Oklahoma statute, were unconstitutional *on their face*. The majority opinion in *Broadrick*, a 5–4 decision, recognized the broad coverage of the Hatch Act and noted "that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the law's] sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615–616.[10]

In subsequent cases involving political activity, but not involving the Hatch Act, this Court has made it clear that a "strict scrutiny" test is to be applied when considering laws involving political activity. The right of political association is a "basic constitutional freedom." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

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[10]Significantly, the cases at bar do not challenge the law on its face. Rather, the challenge is to the law *as applied* to the particular facts presented. This would appear to be precisely the circumstance, contemplated in *Broadrick*, of determining whether the sanctions of the Hatch Act could be constitutionally applied to these specific facts.

> In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." [citation omitted]. Yet, it is clear that "[n]either the right to associate nor the right to participate in political activities is absolute." [citation omitted]. Even a "significant interference with protected rights of association" may be sustained *if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.* [citations omitted].

Buckley, 424 U.S. at 25 (emphasis added).

The Court has made it clear that the right of political association is protected by the First Amendment, and "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Tashjian v. Republican Party of Connecticut,* ____ U.S. ____, 107 S.Ct. 544, 548-549 (1986). In determining that § 316 of the Federal Election Campaign Act, 2 U.S.C. § 441b, as applied to the Massachusetts Citizens for Life, Inc. impermissibly curtailed the organization's constitutionally protected political speech, the Supreme Court made it clear that "[w]hen a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* ____ U.S. ____, 107 S.Ct. 616, 624 (1986). Similarly, under constitutional principles of equal protection: "[Strict scrutiny] oversight by the courts is due when state laws impinge on personal rights protected by the Constitution." *City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 439, 440 (1985).

There should be little doubt that Wayne Camillieri's candidacy for nomination to a position on the Hartford City Council and Jack Winkleman's candidacy for Probate Judge in a general election are activities covered by the First Amendment. Candidacy is protected by the constitution. *Buckley v.*

Valeo, 424 U.S. 1, 25 (1976). Political activity is an integral part of the constitutional freedom represented by the First Amendment. *Tashjian*, ____ U.S. ____, 107 S.Ct. at 548-549; *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Nevertheless, the lower federal courts apparently felt that the *Rodriguez de Quilas* case prevented them from applying the "strict scrutiny" standard of review articulated in a subsequent line of decisions from this Court.

Cases not involving the Hatch Act in which a law burdens political activity are subject to review under a "strict scrutiny" standard. This Court should grant the petition for certiorari in order to make it clear that cases under the Hatch Act are also subject to this level of scrutiny. After all, why should state employees have less ability to fully participate in the political process, on their own time, than all other members of society?

B. In Determining Whether The U.S. Merit Systems Protection Board's Application Of The Hatch Act To Particular Cases Passes A "Strict Scrutiny" Test, The Question Of Whether There Is A Less Restrictive Alternative To Accomplish The Purposes Of The Hatch Act Should Also Be Considered.

One of the main components of a "strict scrutiny" standard of review is whether the government utilized the means to accomplish the desired end that is least restrictive of the employee's rights. *Elrod v. Burns*, 427 U.S. 347, 362-363 (1976). This was not addressed in the Court's previous Hatch Act cases.

It is clear that "the Hatch Act was passed by Congress to address particular forms of political party corruption and coercion perpetrated by, and victimizing federal, state and local government employees." *Bauers v. Cornett*, 865 F.2d 1517, 1520-1521 (8th Cir. 1989). The concern was that public employees would act in concert through coercion and machine

politics to "produce an inordinate influence on the way government executes the laws and provides services." *Biller v. U.S. Merit Systems Protection Bd.*, 863 F.2d 1079, 1090 (2d Cir. 1988). No such facts are present in this matter.

Petitioners argued to both the District Court and the Court of Appeals that provisions of Connecticut law and regulations[11] accomplished the same end as the Hatch Act in preserving the integrity of government, without being as restrictive. Since the lower federal courts felt constrained by the *Rodriguez de Quilas* case, they did not address this argument at all. Review should also be granted in order for this Court to make it clear that in applying a "strict scrutiny" standard of review, consideration must be given to whether a less restrictive means, such as the Connecticut statutes and regulations pointed out to the lower courts, accomplished the same objective as the Hatch Act, thereby preventing the application of the Hatch Act to the facts of the case involved.

C. Whether The Application Of The Hatch Act In A Manner That Imposes A Financial Penalty On A State For Honoring The Constitutional Rights Of A Public Employee Is A Violation Of The Tenth Amendment.

In addition to the concerns that the cases underlying this petition raise about the protection of individual political rights, they also raise serious concerns of federalism. The application of the Hatch Act to these particular cases represents a serious intrusion by the federal government into the internal affairs of the State of Connecticut, in a manner that should not be countenanced under the Tenth Amendment. This issue is separate and apart from the First Amendment and equal protection issues.

The District Court's decision expressed the judge's concerns:

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[11] Conn. Gen. Stat. § 5-266a, and Regulations of Connecticut State Agencies § 5-266a-1 (Connecticut State Ethics Commission).

> While I am sympathetic to the federalism concerns raised by the plaintiffs regarding this part of the Hatch Act, especially in light of the restrictions placed upon states in removing employees from their positions by our developing constitutional law, *see e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), I must follow *Oklahoma [v. Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544 (1947)] and conclude that no unconstitutional intrusion upon the sovereign powers reserved to the State of Connecticut by the Tenth Amendment has taken place.

State of Conn, DHR v. U.S. M.S.P.B., 718 F.Supp. 125, 131-132 (D. Conn. 1989); App. 17A.

The District Court's concern was well founded, and not only because of evolving restrictions on removal of public employees from their positions.[12] The Hatch Act's application in these cases directly intrudes into the State of Connecticut's personnel system.

Petitioners recognize that *State of Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947) determines that the Hatch Act does not violate the Tenth Amendment. 330 U.S. at 143. By raising this issue in this petition, petitioners are asking that this Court seriously consider whether its

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[12]Under the *Loudermill* decision, prior to terminating a tenured employee, the public employer must provide "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 470 U.S. at 546. Finalizing this process within thirty days of a determination by the Board that there is a Hatch Act violation that warrants removal in order to act prior to any order to withhold federal funding issues, consistent with the due process rights of the employee, would be extremely difficult at best. This puts the State between the proverbial rock and the hard place of weighing financial exposure resulting from the federal government withholding federal funding on one side against financial exposure resulting from violating the due process rights of the employee on the other side.

determination in *Oklahoma* that the Hatch Act does not violate the Tenth Amendment be limited or overruled.

The decision in *Oklahoma* was well before the Court's much more recent discussions of Tenth Amendment law in general in *Maryland v. Wirtz*, 398 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Hodel v. Virginia Surface Min. & Reclaim. Ass'n*, 452 U.S. 264 (1981); and *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985). Of course, in view of the holding in *Garcia*, petitioners are also asking this Court to seriously consider whether its determination in *Garcia* be limited or overruled.

This case presents a better case for recognizing the limitations brought about by the Tenth Amendment than *Garcia*. First of all, the Hatch Act only regulates states as states, unlike the Fair Labor Standards Act, addressed in *Garcia*, which regulates governmental entities and private entities. It is only where the law regulates governmental and private entities, such as in *Garcia* where

> federal and state courts have struggled with the task . . . of identifying a traditional [governmental] function for purposes of state immunity under the Commerce Clause . . . [and this attempt] . . . is not only unworkable but is inconsistent with established principles of federalism.

Garcia, 469 U.S. at 530 (1985).

Since the Hatch Act does not involve private entities, it is not even necessary to try to draw the line that divides traditional governmental functions from other functions. Moreover, the Hatch Act is based upon the spending power rather than the Commerce Clause. The Court in *National League of Cities* recognized that there was a difference between the two. 426 U.S. at 852 n.17. Clearly "[t]here are limits on the power of Congress to impose conditions on the

states pursuant to its spending power." *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 n.13 (1981).

Granting this petition on the question of whether the Hatch Act's application in the cases underlying the petition violated the Tenth Amendment would allow this Court to consider when the limits on Congress intruding into the internal affairs of a State pursuant to the spending power are reached.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that a writ of certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PETITIONERS

STATE OF CONNECTICUT,
DEPARTMENT OF HUMAN RESOURCES

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RJC MANDATE CONN.
H87-CV 406/779
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CABRANES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of January, one thousand nine hundred and ninety.

Present:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND
HONORABLE RICHARD J. CARDAMONE
HONORABLE FRANK X. ALTIMARI
Circuit Judges [SEAL]

STATE OF CONNECTICUT, DEPARTMENT OF HUMAN RESOURCES, WAYNE H. CAMILLIERI, JACK I. WINKLEMAN,
Plaintiffs-Appellants,
— against —
UNITED STATES MERIT SYSTEMS PROTECTION BOARD,
Defendant-Appellees.

ORDER
Docket No. 89-6176

The State of Connecticut, Department of Human Resources (DHR) and two of its employees, Wayne H. Camillieri and Jack I. Winkleman, appeal the order of the United States District Court for the District of Connecticut (Cabranes, J.) granting summary judgment in four consolidated cases. *State of Connecticut, Dep't of Human Resources v. United States Merit Systems Protection Board,* 718 F. Supp. 125 (D. Conn. 1989). Each of these cases was a statutory petition for review, pursuant to 5 U.S.C. § 1508, of a final

decision and order of the United States Merit Systems Protection Board (Board) withholding funding from the State of Connecticut for failing to remove Camillieri and Winkleman.

The Board ordered the DHR to remove Camillieri and Winkleman after it found that each employee had violated provisions of the Hatch Act, 5 U.S.C. § 1501, et seq., (1988) by running for local political offices in partisan elections. The Hatch Act restricts the political activity of public employees, including states employees "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal Agency." 5 U.S.C. § 1501(4). The Board found that Camillieri and Winkleman were subject to the provisions of the Hatch Act and, upon learning of their candidacies for public office, warned both employees that if they continued in their candidacies they would be in violation of the Hatch Act and subject to removal. When both employees continued to run for office, the Board ordered the DHR to remove them. After the DHR failed to do so, the Board issued an Order and Certification, pursuant to 5 U.S.C. § 1506, directing the withholding of federal funding from the DHR in an amount equivalent to two years salary for each employee.

The DHR and the employees petitioned for review of this order in the district court, claiming that the Hatch Act, as applied in this case, violated the First and Tenth Amendments of the Constitution, as well as the constitutional right to equal protection of the laws as applied to the federal government through the Due Process Clause of the Fifth Amendment. They also argued that the Board's decision was arbitrary, capricious, and an abuse of discretion. The district court granted summary judgment in favor of the Board. The DHR and the employees then appealed the order of summary judgment to this Court. Only the appellants' constitutional challenges remain for our consideration.

For the well-stated reasons given by Judge Cabranes, we affirm. The Supreme Court has issued definitive rulings holding that the Hatch Act does not violate a state employee's First Amendment rights or a state's Tenth Amendment rights. *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 103 (1947); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 142-43 (1947); *United States Civil Service Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 556 (1973). The Court has also held that a similar state statute did not violate the Equal Protection Clause by distinguishing between "classified" and "unclassified" employees in applying its restrictions on political activity. *Broadrick v. Oklahoma*, 413 U.S. 601, 607 n.5 (1973).

Appellants urge us to overturn these Supreme Court rulings because, appellants argue, they "are not consistent with [the Supreme Court's] present day understanding" of the First and Tenth Amendment. However, the Supreme Court has recently stated that the lower federal courts are not free to disregard directly applicable Supreme Court precedent on the theory that it has been undermined by that Court's reasoning in another line of cases. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917, 1921-22 (1989).

The order of the district court is therefore affirmed.

N.B.: This Summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in related cases before this or any other court.

/s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland, U.S.C.J.

/s/ Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

/s/ Frank X. Altimari
Frank X. Altimari, U.S.C.J.

A TRUE COPY
ELAINE B. GOLDSMITH
/s/ Elaine B. Goldsmith
Clerk

ISSUED AS MANDATE: Feb. 7, 1990

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, DEPT. OF HUMAN RESOURCES and WAYNE H. CAMILLIERI
v. : CIVIL NO. H-87-406(JAC)
UNITED STATES MERIT SYSTEMS PROTECTION BOARD

STATE OF CONNECTICUT, DEPT. OF HUMAN RESOURCES and WAYNE H. CAMILLIERI
v. : CIVIL NO. H-87-779(JAC)
UNITED STATES MERIT SYSTEMS PROTECTION BOARD

STATE OF CONNECTICUT, DEPT. OF HUMAN RESOURCES and JACK I. WINKLEMAN
v. : CIVIL NO. H-88-65(JAC)
UNITED STATES MERIT SYSTEMS PROTECTION BOARD

STATE OF CONNECTICUT, DEPT. OF HUMAN RESOURCES and JACK I. WINKLEMAN
v. : CIVIL NO. H-88-335(JAC)
UNITED STATES MERIT SYSTEMS PROTECTION BOARD

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Counsel for United States Merit Systems Protection Board

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

JOSÉ A. CABRANES, District Judge:

These cases challenge the legality and constitutionality of determinations and orders of the defendant United States Merit Systems Protection Board ("the Board") applying the Hatch Act, 5 U.S.C. § 1501 *et seq.*,[1] to plaintiffs Wayne H. Camillieri ("Camillieri") and Jack I. Winkleman ("Winkleman"), employees of the plaintiff State of Connecticut, Department of Human Resources ("the DHR"). The Board determined that Camillieri and Winkleman had each violated 5 U.S.C. § 1502(a)(3) by seeking elective office while employed by the DHR, and it further determined that these violations

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[1] Another portion of the Hatch Act applies to certain employees of the federal government and the government of the District of Columbia. *See* 5 U.S.C. § 7324.

warranted by the removal of Camillieri and Winkleman from their positions. After being informed by the DHR that Camillieri and Winkleman would not be removed, the Board ordered that federal funds be withheld from the DHR in an amount equal to two years' pay of Camillieri and Winkleman. Pursuant to 5 U.S.C. § 1508, the DHR, Camillieri, and Winkleman seek judicial review of these determinations and orders.[2]

Now pending before the court are motions for summary judgment filed by both sides.[3] The parties had stipulated to the material facts in the proceedings before the Board, and they have adopted these stipulations for purposes of these motions. On December 7, 1987 oral argument was held on the motions for summary judgment in Civil Action No. H-87-406(JAC) and Civil Action No. H-87-779(JAC) ("the Camillieri cases"). I reserved decision and requested a supplemental memorandum. Soon afterward, Civil Action No. H-88-65(JAC) and Civil Action No. H-88-335(JAC) ("the Winkleman cases") were filed. The Winkleman cases appeared to raise virtually identical factual and legal issues as the Camillieri cases, and I ordered the four cases consolidated for pretrial purposes on June 17, 1988. I also deferred ruling on the summary judgment motions in the Camillieri cases until the Winkleman cases had reached the same procedural posture, so I could rule on both sets of cases at once.

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[2] Civil Acion No. H-87-406(JAC) seeks review of the determination that Camillieri had committed a violation that warranted removal; Civil Action No. H-87-779(JAC) seeks review of the order withholding federal funds in an amount equal to two years' pay of Camillieri; Civil Action No. H-88-65(JAC) seeks review of the determination that Winkleman had committed a violation that warranted removal; and Civil Action No. H-88-335(JAC) seeks review of the order withholding federal funds in an amount equal to two years' pay of Winkleman.

[3] The DHR and the Board have each moved for summary judgment in all four cases, while Camillieri has moved for summary judgment in Civil Action No. H-87-406(JAC) and Winkleman has moved for summary judgment in Civil Action No. H-88-65(JAC).

On May 15, 1989 I issued an order noting that substantially similar motions for summary judgment were now pending in the Camillieri cases and the Winkleman cases and stating that I would rely on the December 7, 1987 oral argument in deciding the motions pending in both sets of cases without having any additional oral argument. None of the parties raised any objections to this manner of proceeding, and therefore the motions are now ripe for decision.[4]

FACTS

The material facts in these cases are undisputed.

A.

Camillieri joined the DHR in 1979. By 1983, he had obtained the position of Human Resources Chief of Social Work Services. In that year he was elected to the Hartford City Council.

In January 1985 Camillieri was reassigned within the DHR to the position of Acting Chief of the Fair Housing Unit. The purpose of this reassignment was to give Camillieri a job that required less involvement with federally funded activities while avoiding contravention of the Connecticut law prohibiting demotion (or transfer to a noncomparable position) on the basis of political activities. In Camillieri's new position, he spent a little less than half of his time in duties related to federally funded programs, primarily training and supervising hearing examiners who review appeals by individual applicants for participation in these programs. Camillieri himself neither heard these appeals nor

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[4] Also ripe for decision were motions to dismiss the Special Counsel of the Board as a separately named defendant. Since the record reflected that the Special Counsel had been properly named as a party and served, the DHR had no objection to dismissal, and I granted these motions, absent objection, in each case on June 26, 1989.

set the policies under which the appeals were adjudicated, and, although he had the authority to review the decisions of the hearing examiners, in practice he only made revisions as to grammar and style.

On May 31, 1985 the Office of Special Counsel to the Board informed Camillieri that the Hatch Act prohibited him from being a candidate for reelection as councilman while maintaining his job with the DHR, and it warned him that seeking reelection would be considered a willful violation of the Hatch Act which could lead to his removal from his position with the DHR. In July 1985 Camillieri announced that he was running for reelection. During his candidacy for reelection, Camillieri remained on active duty as Acting Chief of the Fair Housing Unit. Camillieri was defeated in the primary election on September 10, 1985.

On March 10, 1986 the Office of Special Counsel to the Board filed a complaint with the Board charging Camillieri with a violation of 5 U.S.C. § 1502(a)(3).[5] On December 18, 1986 the Board's Chief Administrative Law Judge issued a recommended decision concluding that Camillieri was covered by the Hatch Act, because of the amount of time he spent in federally funded activities and the authority he had to review decisions concerning the disbursement of federal funds, and further concluding that he had knowingly violated the Hatch Act. The recommended decision also found that the violation warranted Camillieri's removal from his position with the DHR. On May 12, 1987 the Board adopted this decision as its determination pursuant to 5 U.S.C. § 1505. On September 29, 1987, after being informed by the DHR that Camillieri would not be removed, the Board ordered, pursuant

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[5] This section provides in pertinent part, "A State or local officer or employee may not . . . be a candidate for elective office." In turn the term "State or local officer or employee" is defined, subject to exceptions not here relevant, as "an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. § 1501(4).

to 5 U.S.C. § 1506, that federal funds be withheld from the DHR in an amount equal to two years' pay of Camillieri, $90,150.

B.

Throughout 1986 Winkleman held the position of Human Resource Development Senior Representative in the Monitoring and Evaluation Division of the DHR. In that position, he reviewed and evaluated the management and effectiveness of community and social service programs funded in large part by federal grants. On July 25, 1986 Winkleman notified the Town Clerk of Wallingford that he was running as the Republican Party candidate for Judge of Probate.

On October 9, 1986 the Office of Special Counsel to the Board informed Winkleman that the Hatch Act prohibited him from being a candidate for Judge of Probate while maintaining his job with the DHR. During his candidacy for Probate Judge, Winkleman remained on active duty as a Human Resource Development Senior Representative with the Monitoring and Evaluation Division. A campaign organization was formed in furtherance of Winkleman's race to become Probate Judge, and he solicited votes, authorized advertisements, and incurred campaign expenses. Winkleman was defeated in the general election on November 4, 1986.

On March 6, 1987 the Office of Special Counsel to the Board filed a complaint with the Board charging Winkleman with a violation of 5 U.S.C. § 1502(a)(3). On September 24, 1987 the Board's Chief Administrative Law Judge issued a recommended decision concluding that Winkleman was covered by the Hatch Act and had violated the Hatch Act by being a candidate for the position of Probate Judge, because he actively campaigned for that office and received votes in an election that was partisan. The recommended decision further found that the violation warranted Winkleman's removal from his position with the DHR. On January 26, 1988 the

Board adopted this decision as its determination pursuant to 5 U.S.C. § 1505. On May 18, 1988, after being informed by the DHR that Winkleman would not be removed, the Board ordered, pursuant to 5 U.S.C. § 1506, that federal funds be withheld from the DHR in an amount equal to two years' pay of Winkleman, $60,896.

DISCUSSION

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As the material facts are undisputed, I must determine for each motion whether, viewing the inferences to be drawn from the facts in the light most favorable to the party opposing the motion, *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), the moving party is entitled to a judgment as a matter of law.

In reviewing a determination of the Board under 5 U.S.C. § 1505, or an order of the Board under 5 U.S.C. § 1506, "[t]he court shall affirm the determination or order . . . if the court determines that it is in accordance with law." 5 U.S.C. § 1508. Plaintiffs contend that the Board's determinations and orders applying the Hatch Act to Camillieri and Winkleman violated their rights under the First and Tenth Amendments to the United States Constitution, as well as their constitutional right to equal protection of the laws. They also contend that the determination that each violation "warrants the removal of the officer or employee from his office or employment," 5 U.S.C. § 1505(2), was arbitrary, capricious, and an abuse of discretion. Winkleman further contends that the determination and order with respect to him were not in accordance with law because the position of Judge of Probate is not an "elective office" within the meaning of 5 U.S.C.

§ 1502(a)(3).[6] For the non-constitutional challenges, the Supreme Court has indicated that a court should not reverse a decision if the Board "had solid footing in the [Hatch] Act for [its] conclusion," *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 145 (1947) (*"Oklahoma"*).

A. Constitutional Challenges

Plaintiffs argue that the application of the Hatch Act in this case unconstitutionally infringes upon Camillieri's and Winkleman's rights of political association and political expression under the First Amendment. They also argue that it unconstitutionally intrudes upon the sovereign powers reserved to the State of Connecticut by the Tenth Amendment, specifically the state's power to choose and regulate its own employees. Their third constitutional argument is that the application of the Hatch Act in this case violates Camillieri's and Winkleman's rights to equal protection of the laws, because the prohibition against being a candidate for elective office that the Board applied to Camillieri and Winkleman would not apply to other state employees. In order to evaluate these constitutional challenges to the determinations and orders at issue here, it is necessary to consider the four Supreme court cases addressing the constitutionality of various provisions of the Hatch Act.

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[6] Winkleman also maintains that the determination and order of the Board deprived him of his property interest in his continued employment with the DHR without due process of law, in violation of the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). This argument is inapplicable to the present case because Winkleman is still employed by the DHR in the same position, and he therefore has not been deprived of any property interest. Even assuming *arguendo* that the actions of the Board could in some sense be said to have deprived Winkleman of his continued employment, the Board provided the notice of the charges, explanation of the evidence, and opportunity to be heard required by *Loudermill* through the hearing conducted before the Chief Administrative Law Judge. To the extent Winkleman is alleging that the DHR rather than the Board failed to accord him due process, those claims would have to be raised in a suit against the DHR.

B. The Supreme Court Decisions

United Public Workers of Amercia (C.I.O.) v. Mitchell, 330 U.S. 75 (1947)("*Mitchell*"), addressed the question of whether George P. Poole, a roller in a United States Mint who was also a ward executive committeeman of a political party and worker at the polls on election day, could constitutionally be disciplined for violating the Hatch Act prohibition against federal employees "taking an active part in political management or in political campaigns," 5 U.S.C. § 7324(a)(2). Considering challenges based upon Poole's rights under the First Amendment and the Due Process Clause of the Fifth Amendment, 330 U.S. at 95, and also challenges based upon the "political rights reserved to the people by the Ninth and Tenth Amendments," 330 U.S. at 94, the Court held that disciplinary action against this federal employee would not be unconstitutional. *Mitchell*, 330 U.S. at 103.

On the same day as it decided *Mitchell*, the court also issued its decision in *Oklahoma*. There, one France Paris[7] had been both a member of the State Highway Commission of Oklahoma and the chairman of the Democratic State Central Committee for Oklahoma. The United States Civil Service Commission[8] determined that Paris had taken an active part in political management and in political campaigns, in violation of 5 U.S.C. § 1502(a)(3) as it then read,[9] and it further determined that this violation warranted removal. 330 U.S. at 133. The State of Oklahoma brought suit for judicial review under 5 U.S.C. § 1508, contending, *inter alia*, that "[t]he

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[7] Curiously, nowhere in his opinion in *Oklahoma* does Justice Reed remark in any way on this extraordinary name. Suffice it to say that this is not a typographical or editorial error.

[8] The United States Civil Service Commission had responsibility for administration of the Hatch Act prior to the creation of the Board.

[9] Prior to its amendment in 1974, 5 U.S.C. § 1502(a)(3) prohibited a State or local officer or employee from "tak[ing] an active part in political management or in political campaigns" rather than from "be[ing] a candidate for elective office."

coercive effect of the authorization [by the Hatch Act] to withhold sums allocated to a state is . . . an interference with the reserved powers of the state" under the Tenth Amendment. 330 U.S. at 142. The Supreme Court disagreed, holding that this application of the Hatch Act to Oklahoma did not violate the Tenth Amendment. 330 U.S. at 143. The Court also stated,

> In . . . *Mitchell* we have considered the constitutionality of this provision from the viewpoint of interference with a federal employee's freedom of expression in political matters and as to whether acting as an official of a political party violated the provision in [§ 1502] against taking part in political management or in political campaigns. We do not think that the facts in this case require any further discussion of that angle.

330 U.S. at 142.

Twenty-six years after *Mitchell* and *Oklahoma*, the Supreme Court again considered the constitutionality of the Hatch Act in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973) (*"Letter Carriers"*). This case involved another challenge by federal employees to the Hatch Act prohibition against "taking an active part in political management or in political campaigns," 5 U.S.C. § 7324(a)(2). In discussing this challenge, the Court said,

> We unhesitatingly reaffirm the *Mitchell* holding that Congress had, and has, the power to prevent Mr. Poole and others like him from holding a party office, working at the polls, and acting as party paymaster for other party workers. An Act of Congress going no farther would in our view unquestionably be valid. *So would it be if, in plain and understandable language, the statute forbade activities such as . . . becoming a partisan candidate for, or campaigning*

> *for, an elective public office* . . . . Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

413 U.S. at 556 (emphasis added). The Court went on to hold that § 7324(a)(2) was neither unconstitutionally vague nor unconstitutionally overbroad.

A companion case to *Letter Carriers, Broadrick v. Oklahoma*, 413 U.S. 601 (1973) ("*Broadrick*"), featured a challenge by state employees to a state statute that prohibited them from being, *inter alia*, "a candidate for nomination or election to any paid public office," 413 U.S. at 606. The Court held that this statute was also neither unconstitutionally vague nor unconstitutionally overbroad. It also stated that, insofar as the statute forbade the employees from "becoming . . . candidates for any paid public office," it did not violate the First Amendment (as made applicable to the states by the Fourteenth Amendment). 413 U.S. at 616–17. Moreover, the Court indicated that the statute's distinction between "classified" civil service employees (to whom the statute applied) and "unclassified" ones (to whom it did not) did not violate the Equal Protection Clause of the Fourteenth Amendment. *See* 413 U.S. at 607 n.5.

The Supreme Court has thus upheld the constitutionality of various provisions of the Hatch Act against various attacks. Plaintiffs contend, however, that these decisions "are not consistent with the present day understanding of the First Amendment," Memorandum in Support of Motion for Summary Judgment Filed by State of Connecticut, Department of Human Resources and in Opposition to Motion for Summary Judgment filed by U.S. Merit Systems Protection Board (filed Aug. 21, 1987 in Civil Action No. H-87-406(JAC)) ("DHR's Memorandum") at 10, and were "not made in accordance with the Tenth Amendment standard that the Court has subsequently articulated," *id.* at 26–27, n.13. They also

assert that the cases addressing First Amendment and Equal Protection challenges to the Hatch Act involved only federal regulation of federal employees and State regulation of state employees, not the federal regulation of state employees presented in this case, DHR's Memorandum at 10, n.6 and at 35–36, and that the case addressing the Tenth Amendment challenge involved only a determination that a Hatch Act violation warranted removal, not an order to withhold federal funds from a state, Supplemental Memorandum of State of Connecticut, Department of Human Resources (filed Dec. 31, 1987 in Civil Action No. H-87-406(JAC)) ("DHR's Supplemental Memorandum") at 16–17.

In addressing these contentions of plaintiffs, I am mindful of the Supreme Court's recent admonition in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989). The Court of Appeals for the Fifth Circuit had required certain claims to go to arbitration, despite a 1953 Supreme Court case (*Wilko v. Swan*, 346 U.S. 427) to the contrary, on the grounds that later Supreme Court cases had reduced the 1953 case to "obsolescence." Although it affirmed, the Supreme Court stated,

> We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas, 109 S. Ct. at 1921–22. Keeping this approach in mind, I will now consider plaintiffs' various constitutional challenges.

C. First Amendment

With regard to the claimed infringements upon Camillieri's and Winkleman's rights of political association and political expression under the First Amendment, I conclude that *Mitchell*, *Oklahoma*, *Letter Carriers*, and *Broadrick* directly apply to these cases and demonstrate that no First Amendment violation has occurred. *Mitchell* upholds the constitutionality of the Hatch Act provision covering federal employees; *Oklahoma* applies the analysis of *Mitchell*, as it relates to freedom of expression, to the Hatch Act provision prohibiting state employees from taking an active part in political management or in political campaigns; *Letter Carriers* reaffirms *Mitchell* and states that a federal government prohibition against federal employees becoming partisan candidates for elective public office or campaigning for elective public office would not violate the First Amendment; and *Broadrick* allows a state government to forbid state employees from becoming candidates for paid public office. The clear consequence of these opinions is that infringements upon the ability of government employees, be they federal or state, to be candidates for elective office do not violate the First Amendment. I fail to see how the fact that the infringements upon state employees Camillieri and Winkleman were imposed by the federal government makes any difference in determining whether the First Amendment permits the infringement, especially since *Oklahoma* involved federal regulation of state employees.

D. Tenth Amendment

Turning next to the claimed violation of the Tenth Amendment, *Oklahoma* is directly controlling. Plaintiffs appear to concede as much. *See* Transcript of Oral Argument held December 7, 1987 (filed Dec. 21, 1987) ("Transcript") at 43. Although Congress has amended the Hatch Act since the time of the *Oklahoma* decision, the amended § 1502(a)(3) (prohibiting "be[ing] a candidate for elective office") is less restrictive than the old provision (prohibiting "tak[ing] an

active part in political management or in political campaigns") and therefore presents even less of a claim for a Tenth Amendment violation than the argument rejected by the Supreme Court in *Oklahoma*.[10] While I am sympathetic to the federalism concerns raised by plaintiffs regarding this part of the Hatch Act, especially in light of the restrictions placed upon states in removing employees from their positions by our developing constitutional law, *see, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), I must follow *Oklahoma* and conclude that no unconstitutional intrusion upon the sovereign powers reserved to the State of Connecticut by the Tenth Amendment has taken place.

E. Equal Protection

Plaintiff's final claim is that the application of the Hatch Act in this case violates Camillieri's and Winkleman's rights to equal protection of the laws. Specifically, plaintiffs challenge the constitutionality of the statutory classifications that would prohibit Camillieri and Winkleman from being candidates for elective office but would allow the candidacies of the Governor or Lieutenant Governor or mayor of a city, 5 U.S.C. § 1502(c)(1) and (2), "an individual holding elective office," 5 U.S.C. § 1502(c),[11] a state employee outside the executive branch and its agencies and departments,[12] or "an

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[10]I disagree with plaintiffs' contention that the present cases differ from *Oklahoma* because an order withholding funds from the state has actually issued here. The *Oklahoma* court certainly envisaged a withholding order, *see* 330 U.S. at 133, and in fact indicated the state had standing to sue because of "the special interest Oklahoma had in preventing the exercise of the Civil Service Commission's power to direct that Oklahoma's funds be withheld," 330 U.S. at 137 (footnote omitted).

[11]This subsection does not exempt all persons holding elective office, but only those whose elective position involves administration of, or responsibility for, federally funded projects. *Northern Virginia Regional Park Authority v. United States Civil Service Commission*, 437 F.2d 1346, 1351-52 (4th Cir.), *cert. denied*, 403 U.S. 936 (1971).

[12]The requirements of 5 U.S.C. § 1502(a)(3) only apply to individuals employed by a State or local agency, and "State or local agency" is defined as "the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof." 5 U.S.C. § 1501(2).

individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization," 5 U.S.C. § 1501(4)(B). This challenge also must fail.

I recognize that this constitutional argument, unlike the previous two, does not fall within the direct application of any of the Supreme Court cases upholding the Hatch Act. Nonetheless, I note that in *Broadrick* the Court concluded that a state statute that distinguished between "classified" civil service employees, who were not allowed to become candidates for paid public office, and "unclassified" ones, who were, did not violate the Equal Protection Clause of the Fourteenth Amendment. The Court stated that "the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed." 413 U.S. at 607, n.5 (citation omitted). I see no reason why the distinctions between Camillieri and Winkleman on the one hand, and the kinds of state employees not covered on the other hand, are not within the leeway envisaged by *Broadrick*.

Accordingly, the determinations and orders at issue here were in accordance with the Constitution.

F. Non-Constitutional Challenges

Plaintiffs appear to concede that the determination and order with respect to Camillieri were "in accordance with law" if they did not violate the Constitution. *See* Transcript at 20, DHR's Supplemental Memorandum at 3. In any event, the Board's determination that despite his transfer Camillieri was still covered by the Hatch Act and had committed a violation was well within its discretion, as was its determination that since Camillieri acted knowingly and willfully the violation warranted removal from office. *See State of Minnesota,*

Dept. of Jobs and Training v. Merit Systems Protection Board, 875 F.2d 179 (8th Cir. 1989) (en banc) (determination by Board that Hatch Act violation warranted removal from office because violation was willful and knowing, where person relied on court opinion that conduct was not violation, was within the Board's discretion). I am aware of no persuasive authority, and none has been brought to my attention, for plaintiffs' contention that the failure of the Board to conclude that Camillieri's Hatch Act violation was *de minimis* constituted an abuse of discretion.[13]

Winkleman contends that the determination and order with respect to him were not in accordance with law because the position of Judge of Probate is not an "elective office" within the meaning of 5 U.S.C. § 1502(a)(3). The Board concluded otherwise, because Winkleman was a partisan candidate for the position in a partisan general election. This conclusion "had solid footing in the [Hatch] Act," *Oklahoma*, 330 U.S. at 145.

Excluded from the prohibition against being a candidate for elective office is the situation in which "none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected," 5 U.S.C. § 1503, *i.e.*, the situation in which the election does not contain Democratic or Republican nominees. Winkleman, on the other hand, was the Republican candidate for Probate Judge. Since the Hatch Act was directed at situations "when employees participate or are directly affiliated with a political party," *Biller v. United States Merit Systems Protection Board*, 863 F.2d 1079, 1090 (2d Cir. 1988), I cannot find that the determination that

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[13]The fact that Camillieri, despite his authority to do so, did not routinely make substantive decisions regarding federally funded programs does not seem sufficient to create a *de minimis* violation. In *Mitchell* the Court held that a roller with a United States Mint could be disciplined under the Hatch Act.

Winkleman had violated the Hatch Act was not in accordance with law. *See Brandon v. Southwest Mississippi Senior services, Inc.*, 834 F.2d 536, 537 (5th Cir. 1987) (employee covered by Hatch Act who ran as independent for position of Justice Court Judge, in election where other candidates were partisan, violated the Hatch Act). Once the Board determined that Winkleman had committed a violation, then (as with Camillieri) there was no abuse of discretion in its determination that, since Winkleman had been warned, the violation warranted removal.

Accordingly, the undisputed facts show that the Board's determinations and orders in these cases were "in accordance with law" within the meaning of 5 U.S.C. § 1508. Judgment must therefore enter in favor of the Board in all four cases.

CONCLUSION

For the foregoing reasons, Respondent Merit Systems Protection Board's Motion for Summary Judgment (filed Aug. 6, 1987 in Civil Action No. H-87-406 (JAC)), Respondent Merit Systems Protection Board's Cross-Motion for Summary Judgment (filed Nov. 10, 1987 in Civil Action No. H-87-779(JAC)), Respondent Merit Systems Protection Board's Cross-Motion for Summary Judgment (filed March 31, 1988 in Civil Action No. H-88-65(JAC)), and Respondent Merit Systems Protection Board's Cross-Motion for Summary Judgment (filed July 8, 1988 in Civil Action No. H-88-335(JAC)) are all GRANTED.

The DHR's Motion for Summary Judgment (filed Aug. 21, 1987 in Civil Action No. H-87-406(JAC)), Motion for Summary Judgment (filed Oct. 22, 1987 in Civil Action No. H-87-779(JAC)), Motion for Summary Judgment (filed March 14, 1988 in Civil Action No. H-88-65(JAC)), and Motion for Summary Judgment (filed June 22, 1988 in Civil Action No. H-88-335(JAC)); Camillieri's Motion for Summary Judgment (filed Sept. 16, 1987 in Civil Action No. H-87-406(JAC)); and Winkleman's Motion for Summary Judgment (filed July 14, 1988 in Civil Action No. H-88-65(JAC) are all DENIED.

Judgment shall enter in favor of the United States Merit Systems Protection Board in Civil Action No. H-87-406(JAC), Civil Action No. H-87-779(JAC), Civil Action No. H-88-65(JAC), and Civil Action No. H-88-335(JAC).

It is so ordered.

Dated at New Haven, Connecticut, this 24th day of July 1989.

/s/ José A. Cabranes
José A. Cabranes
United States District Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD, Petitioner,	DOCKET NUMBER HQ12068610010
v.	Date: *December 18, 1986*
WAYNE H. CAMILLIERI and CONNECTICUT DEPARTMENT OF HUMAN RESOURCES, Respondents.	

Stephen B. Delaney, Esquire, for Respondent Camillieri.

Robert B. Teitelman, Esquire, for Respondent Connecticut Department of Human Resources.

Robert H. Stern, Esquire, for Petitioner.

BEFORE
Edward J. Reidy
Chief Administrative Law Judge

RECOMMENDED DECISION

INTRODUCTION

This proceeding arose as a result of a Complaint for Disciplinary Action against the respondents, Wayne Camillieri and the Connecticut Department of Human Resources (DHR), filed on March 10, 1986, by the Office of the Special Counsel (OSC). Petitioner charged that Camillieri violated

5 U.S.C. § 1502(a)(3), the Hatch Political Activities Act (Hatch Act), when he was a candidate for councilman in a Democratic primary election in Hartford, Connecticut, on September 10, 1985.

The parties agreed to waive an evidentiary hearing to which respondents were entitled and submitted the case on the official record comprised of the pleadings, the Joint Stipulation of Facts, and Joint Stipulations regarding the authenticity of proposed exhibits. OSC and the DHR timely filed written briefs and the former filed a reply brief. No brief was received from respondent Camillieri. Based upon my consideration of the record as a whole, I make the following findings, conclusions and recommendations.

FINDINGS OF FACT

Wayne Camillieri has been employed by the DHR, a state executive agency, since 1979. Special Counsel Complaint (hereafter "Com.") Para. 1; Respondent DHR Answer (hereafter "Ans.") Para. 1. In 1983, he ran as a candidate for the office of councilman in a local partisan election in Hartford and on November 8, 1983, was elected to serve a 2-year term. Com. 3; Ans. 3.

Prior to January 1985, Camillieri was Chief of DHR's Work Incentive Program which was primarily financed with federal funds. In January 1985, respondent was assigned within the DHR to the position of Acting Chief, Fair Housing Unit (FHU). Joint Stipulation of Fact (hereafter "JSF") 3. The assignment occurred as the result of efforts by DHR to place Camillieri in a position which required less involvement with federally funded activities. *Id.*

As Acting Chief of FHU Camillieri was responsible for training and supervising examiners who heard and decided administrative appeals filed by individuals and groups wishing to participate in state and federally funded social

service programs administered by DHR.[1] JSF 4. Although Camillieri had the authority to review and revise the decisions of the hearing officers, in practice he only returned decisions for grammatical corrections. JSF 8. Respondent spent slightly less than half of his time working on federally funded programs, with approximately half of that time training hearing officers on the proper method for conducting hearings under the Connecticut Uniform Administrative Procedures Act. JSF 7.

On May 31, 1985, petitioner sent Camillieri a letter informing him of the restrictions placed by the Hatch Act on the political activity of state executive agency employees involved with programs funded in whole or in part by loans or grants made by the United States or a federal agency. Com. 7; Ans. 7; Joint Stipulation of Exhibits (hereafter "JSE") 5. OSC officially warned Camillieri that any participation as a candidate for re-election to the position of Councilman of Hartford City upon expiration of his current term would be considered a willful violation of the Hatch Act which could lead to his removal from his position with the DHR. JSE 5. OSC provided him with the name and telephone number of an employee of the OSC to whom he could direct questions about the Hatch Act, and a copy of the Special Counsel's publication *Political Activity and the State and Local Employee. Id.*

Despite this warning, on or about July 22, 1985, Camillieri held a press conference to announce his candidacy for partisan elective office. JSF 15. At that time, he acknowledged receiving the aforementioned warning letter

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[1] In 1985, the DHR received approximately 60 percent of its funding from the federal government. JSF 10. With respect to that funding, the FHU had the authority to hear and decide appeals regarding the following programs: Work Incentive Program, Child Support Enforcement Program, Emergency Food Assistance Program, Child Nutrition Program, Community Services Block Grant, Social Services Block Grant, Refugee Resettlement Program, Low-Income Home Energy Assistance Program, and Weatherization Assistance for Low Income Persons. JSF 9.

from the OSC. *Id.* Nonetheless, he declared his candidacy in reliance on a memorandum issued by Connecticut Attorney General Joseph I. Lieberman on March 18, 1985.[2] *Id.*

In that memorandum, entitled *Political Activities of State Employees,* the attorney general stated that under state law, state employees may be candidates for state or local office without fear of disciplinary action. JSE 4, p. 2, 10. In addition, he stated that under Federal law, the Hatch Act prohibits being a candidate for elective public office in a partisan election, JSE 4, p. 8, and that if the Board finds that an employee has violated the Hatch Act, the penalty of removal may be recommended. *Id.* He noted, however, that since candidacy for elective office is expressly permitted under state law, there is no just cause for discharge of the employee, or any other discipline, under state law. JSE 4, p. 10.

Thereafter a campaign organization was formed in support of Camillieri's partisan re-election bid and he solicited votes, authorized political advertisements and incurred campaign expenses. JSF 14. Camillieri was a candidate in the September 10, 1985 partisan political election. JSF 13. He was defeated. This complaint was filed on March 10, 1986.

ANALYSIS

The facts relating to respondent Camillieri's candidacy are not contested. Although not raised in argument, to the extent DHR appears to assert in its discussion of the penalty that, as acting chief of the FHU, Camillieri was not a covered employee because his position had limited influence on federally funded activities, that argument is without merit.

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[2] Sometime after he received the warning letter and before the announcement of his candidacy, Camillieri also sought advice from his attorney who informed him that he could be a candidate for councilman. Com. 8; Ans. 1. Neither Camillieri nor his attorney contacted OSC for further information or advice. *Id.*

Respondent was an employee of Connecticut's DHR which, in 1985 — the year of his candidacy — received approximately 60 percent of its funding from federal grants and loans. He was senior manager of the Fair Housing Unit which performed functions in connection with multi-million dollar social service programs funded by several federal agencies. Although Camillieri did not conduct hearings nor make substantive changes in the decisions of the hearing officers concerning the disbursement of federal funds, he had the authority to review and revise their decisions to ensure that conclusions of fact and law were consistent with hearing records. As a normal and foreseeable incident to his official position Camillieri spent almost half of his working time in connection with federally funded activities.

As long as the person charged with violating section 1502(a)(3) of the Hatch Act is principally employed *in connection with* an activity which is financed in whole or in part by loans or grants from the government, that person is a covered employee within the meaning of the Hatch Act. *See Special Counsel v. Dunton*, 5 M.S.P.R. 147 (1981). I find therefore that the preponderant evidence establishes that the State of Connecticut employed the respondent in a position funded in part by federal grants; that he became a candidate for councilman for the city of Hartford; that he ran in the primary election for that position on September 10, 1985; and that the election was partisan. He falls within the jurisdiction of the Board.

Respondent DHR argues that the Board must find the Hatch Act, as OSC seeks to have it applied here, unconstitutional because it interferes with Camillieri's right of association as protected by the First Amendment, infringes on the State of Connecticut's role as a separate sovereign as protected by the Tenth Amendment, and violates Camillieri's right to equal protection of the laws as guaranteed by the Fourteenth Amendment.

Among its claims, DHR argues that the Hatch Act is unconstitutional as applied by OSC because it should not seek disciplinary action when a covered state employee is a candidate in a partisan political election if the laws of the state permit the candidacy. DHR points to the legislative history of the Hatch Act Amendments of 1974, P. Law 93-443, which suggests that any state law regulating the political activities of state and local officers is not preempted or superseded by the 1974 amendments. *See* Senate Conference Report No. 1237, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5669. I believe respondent has misinterpreted the intent of that provision.

Before the 1974 amendments to the Hatch Act were passed, a state or local employee was not permitted to "Take an active part in political management or in political campaigns." In an attempt to repeal some of the restrictions on voluntary partisan political activities, the 1974 amendments eliminated the above prohibition and replaced it with the requirement that a state or local employee may not "be a candidate for elective office."[3] The penalty of removal for a violation was not changed.

At that time, however, many states had promulgated their own laws and regulations patterned after the Federal Hatch Act. I believe that the intent of Congress was to ensure that these more restrictive pre-amendment acts would remain viable even though the Hatch Act restrictions had been relaxed.[4] It would be anomalous to find that the specific language of 5 U.S.C. § 1502(a)(3), forbidding a covered employee's

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[3] Thus, activities such as driving voters to the polls or attending a political convention as a delegate were no longer prohibited by Federal law. *See Report of the Committee on House Administration on the Federal Election Campaign Act Amendments of 1974,* H.R.Rep. No. 1239, 93d Cong., 2d Sess. 11 (1974).

[4] *See, e.g.,* remarks of Representative Nelsen of Minnesota opposing the liberalization of the Hatch Act as applied to state and local employees. Cong. Reg. H7933-34 (daily ed. Aug. 8, 1974).

candidacy in a partisan election, could be defeated by a state law or regulation requiring less. *See In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978)(A meaning that would lead to absurd results or would thwart the obvious purpose of a statute will not be given effect).

Respondent also couches his other constitutional arguments in terms of OSC's application of the Hatch Act. However, the tenor of DHR's arguments do not disguise that agency's direct attack on the constitutionality of the Hatch Act. It is a well-established rule of law that administrative agencies are without authority to determine the constitutionality of statutes. *Fiorillo v. Department of Justice*, 795 F.2d 1544 (Fed. Cir. 1986); *Malone v. Department of Justice*, 14 M.S.P.R. 403 (1983). *See also* 4 Davis, Administrative Law Treatise § 26:6 (1983). Therefore, although the Board has enforcement responsibilities regarding the Hatch Act, 5 U.S.C. § 1504 *et seq.*,[5] it cannot adjudicate the constitutional challenges made by the DHR.[6] *See In the Matter of Vincent J.*

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[5] OSC has applied the Hatch Act in this case in accordance with precedent. *See Special Counsel v. Mahone*, 21 M.S.P.R. 499 (1984); *Special Counsel v. Hayes*, 16 M.S.P.R. 166 (1983); *In the Matter of Charles L. Adam*, 3 P.A.R. 357 (1974); *In the Matter of Joseph B. Montoya*, 3 P.A.R. 193 (1973).

[6] Be that as it may, the Supreme Court has consistently determined that the provisions of the Hatch Act are constitutional. In *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143 (1947), it found that the United States has the power to fix the terms upon which its money allotments to the states shall be disbursed, and determined that the Hatch Act did not violate a state's sovereignty or the Tenth Amendment. In that same decision, citing *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), the Court also sustained the Hatch Act amid claims that political activity restrictions abridged First Amendment rights. In *Broadrick v. Oklahoma*, 413 U.S. 601, 607 n.5, (1973), the Court disposed of an argument that a state Hatch Act discriminated under the Fourteenth Amendment between covered classified state employees and exempted unclassified state employees. *See also United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (the Court held that neither the right to associate nor the right to participate in political activities is absolute and that the First Amendment does not

(continued)

Pizzutello and Department of Social Services, 1 M.S.P.R. 272 (1979). Accordingly, I find that respondent Camillieri has violated 5 U.S.C. § 1502(a)(3) by his candidacy for partisan elective office.

PENALTY

If any penalty for violating 5 U.S.C. § 1502(a), as has occurred here, is to be imposed, it must be removal. 5 U.S.C. § 1505(2); *Special Counsel v. Yoho*, 15 M.S.P.R. 409 (1983). On the other hand the Board may determine that a sustained violation does not warrant removal because of the circumstances of a particular case. *Id.* I now consider whether the circumstances of respondent's violation warrant removal from employment.

Respondent DHR contends that removal is inappropriate because it attempted to find Camillieri a role unrelated to federally funded activities, that Camillieri's role in relation to federal funding was, in fact, limited, and that Camillieri only applied policy as set by DHR. These contentions are unpersuasive. DHR was put on notice by the attorney general's memorandum that loss of federal funding could occur if it refused to comply with an order of the Board directing an employee's removal for violating the Hatch Act. JSE 4, p. 8-9. To avoid such a result, the attorney general recommended permanently transferring a potential Hatch Act violator to an area that performs *no* work at all in connection with a federally funded activity. JSE 4, p. 10. The

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[6] *(continued)*
invalidate a law barring certain partisan political conduct), and *Special Counsel v. Daniel*, 15 M.S.P.R. 636 (1983) (In construing 5 U.S.C. § 1502(a)(3), the Board noted the language of the Supreme Court in *Letter Carriers, supra*, construing the constitutionality of the Hatch Act as it relates to the First and Fourteenth Amendments.)

DHR failed to follow this directive and it must suffer the consequences of its omission.[7]

Moreover, the focus of the inquiry in determining whether removal is appropriate is not on the state agency, but on the employee who violated the Hatch Act. It must be determined whether the prohibited activity was substantial and whether the circumstances demonstrate that the employee acted knowingly in disregard of the law. *Special Counsel v. Mahone,* 21 M.S.P.R. 499 (1984); *In the Matter of Michael K. Lewis,* 3 P.A.R. 93a (1971).

It is clear that Camillieri engaged in a substantial violation of the Hatch Act, 5 U.S.C. § 1501 *et seq.,* when he became a candidate for partisan elective office. *See Special Counsel v. Sims,* 20 M.S.P.R. 236 (1984); *In the Matter of Murphy,* 1 M.S.P.R. 48 (1979). Furthermore, he was put on notice that his candidacy would violate the Hatch Act most notably by the warning letter from OSC, but also by the memorandum from the Attorney General of the State of Connecticut. Both the letter and the memorandum specifically cautioned Camillieri that the penalty under federal law for such a violation was removal. Although Camillieri consulted with an attorney before making his decision to proceed with his candidacy, such an action is not dispositive, especially in light of the fact that the contact was made after he was informed of the potential Hatch Act violation by the Special Counsel and neither he nor his attorney contacted OSC thereafter for further information or advice. *Cf. Special Counsel v. Hayes,* 16 M.S.P.R. 166 (1983) (Removal of state employee not warranted where the employee acted reasonably in seeking legal advice as to

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[7] DHR asserted that there were no available positions, completely unrelated to federal funding, to which Camillieri could have been assigned which did not require a demotion. Under these circumstances, it was in DHR's best interest to encourage Camillieri to refrain from seeking re-election.

specific applicability of the Hatch Act and thus his violation was not willful or knowing.) It is OSC which is charged with enforcement of the Hatch Act.[8]

Camillieri's intent here was clear. The record establishes that, armed with the putative knowledge that he would not be removed from his position, he made a calculated decision to proceed with his candidacy. JSF 15. While his ultimate personal risk of punishment was, in all probability, markedly diminished by the attorney general's proscription against removal for such activity, it does not alter the analysis which must be applied to the issue of what penalty is appropriate. Accordingly, I find that Camillieri willfully and knowingly violated 5 U.S.C. § 1502(a)(3) and that his removal from his position is thus warranted.

RECOMMENDATION

Based upon the evidence of record, I find the preponderant evidence shows a violation as alleged and thus recommend the Board enter an order finding that:

(1) Wayne H. Camillieri knowingly violated 5 U.S.C. § 1502(a)(3) as alleged; and

(2) that the violation was of such scope and effect as to warrant removal of respondent under 5 U.S.C. § 1505.

The parties have 30 days from receipt of this recommended decision to file any exceptions. Exceptions should be filed with the Office of the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419. 5 C.F.R. § 1201.129(b).

/s/ Edward J. Reidy
Edward J. Reidy
Chief Administrative Law Judge

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[8] In *Daniels, supra*, the Board found that even a decision of a U.S. District Court was not dispositive on question of jurisdiction for Hatch Act violations.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Recommended Decision was sent this date by first-class mail to:

Wayne H. Camillieri
114 Mapleton Street
Hartford, Connecticut 06114

Honorable James G. Harris, Jr.
Commissioner
Connecticut Department of
Human Resources
1049 Asylum Avenue
Hartford, Connecticut 06105

Stephen B. Delaney, Esquire
Delaney & Delaney
651 New Britain Avenue
Hartford, Connecticut 06106

Susan Pearlman, Esquire
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Robert E. Walsh
Robert B. Teitelman
Assistant Attorneys General
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Hartford, Connecticut 06114

Robert H. Stern, Esquire
Office of Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005

Honorable Constance Horner
Director
Office of Personnel Management
Attn: Appellate Policies Branch
1900 E Street, N.W., Room 7459
Washington, D.C. 20415

By intra-agency mail to:

Robert E. Taylor
Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Honorable Mary F. Wieseman
Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, Suite 1100
Washington, D.C. 20005

Dated: December 19, 1986

/s/ Betty D. Cannon
Betty D. Cannon
Secretary

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL, Petitioner, v. WAYNE H. CAMILLIERI and, CONNECTICUT DEPARTMENT OF HUMAN RESOURCES,[1] Respondents.	) DOCKET NUMBER) HQ12068610010)) DATE: MAY 12 1987)))))

Stephen B. Delaney, Esquire, for respondent Camillieri.

Robert B. Teitelman, Esquire, for respondent Connecticut Department of Human Resources.

Robert H. Stern, Esquire, for petitioner.

BEFORE
Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

FINAL DECISION AND ORDER

This case is before the Board upon the December 18, 1986 Recommended Decision of Chief Administrative Law Judge

[1] The Board notes that when the Special Counsel charges a state employee with violations of the Hatch Political Activities Act pursuant to 5 U.S.C. § 1502, it is appropriate to name the employing state or local agency as a respondent because, under section 1505, the state or local agency has the right to appear and be heard at a hearing before the Board wherein it is determined whether a violation has occurred.

Reidy (CALJ), issued pursuant to an Office of Special Counsel complaint for disciplinary action against respondents Camillieri[2] and the Connecticut Department of Human Resources (DHR), Camillieri's employing agency. The complaint alleged that respondent Camillieri violated 5 U.S.C. § 1502(a)(3),[3] the Hatch Politicial Activities Act (Hatch Act), when he was a candidate for councilman in a Democratic primary election in Hartford, Connecticut, on September 10, 1985.

The CALJ found that respondent Camillieri knowingly violated section 1502(a)(3) by his candidacy for partisan elective office. The CALJ also determined, in accordance with 5 U.S.C. § 1505, that removal was warranted. This determination was made after consideration of all the circumstances surrounding Mr. Camillieri's candidacy, including the Special Counsel's specific notice to respondent Camillieri that his candidacy violated the Hatch Act, the Connecticut Attorney General's memorandum which noted the risks of Hatch Act violation for Camillieri and the loss of federal funds for DHR, Camillieri's consultation with a private attorney, and DHR's attempts to place Camillieri in a position unrelated to its receipts of federal funds.

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[2] The CALJ mistakenly identified the office to which Camillieri was reassigned as the Fair Housing Unit. Recommended Decision at 2. Camillieri was the Acting Chief of the Fair Hearing Unit.

[3] 5 U.S.C. § 1502(a)(3) provides:

> A State or local officer or employee may not —
>
> * * * * *
>
> (3) be a candidate for elective office.

"State or local officer or employee" is defined in 5 U.S.C. § 1501(4) as:

> an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency . . .

Respondent DHR filed exceptions to the Recommended Decision; respondent Camillieri adopted those exceptions. 51 Fed. Reg. 25,160 (1986) (to be codified at 5 C.F.R. § 1201.129).[4]

The Board has carefully considered the Recommended Decision and the record in light of the exceptions. Respondents' exceptions were merely a refiling of the brief which respondent DHR filed with the CALJ; thus, these exceptions are reargruments of issues presented to and decided by the CALJ. Exceptions without specific record citations and persuasive argument of error are insufficient for the Board to overturn the CALJ's findings. *See Special Counsel v. Hoban*, 24 M.S.P.R. 154 (1984). Moreover, we find that the CALJ adequately and correctly addressed all of the issues raised. Accordingly, we AFFIRM and ADOPT the Recommended Decision as the final decision of the Board and incorporate it herein.

Accordingly, the Connecticut Department of Human Resources is ORDERED to remove Wayne H. Camillieri from his position. 5 U.S.C. § 1505.[5] Pursuant to 5 U.S.C. § 1508, respondents are hereby notified of the right to file a petition for review in the United States district court for the district in which respondents reside or do business within thirty days of the date of mailing of this final decision.

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[4] On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

[5] We note that, pursuant to 5 U.S.C. § 1506(a)(1), if DHR fails to remove respondent Camillieri within 30 days after the date of this Final Decision and Order, the Board shall order the appropriate Federal agency to withhold from DHR's loans or grants an amount equal to two years' pay for Mr. Camillieri. Thus, DHR may choose to remove Mr. Camillieri or to forfeit receipt of Federal funds in an amount equal to two years' of his pay. We further note that if Mr. Camillieri is rehired in a state or local agency in Connecticut within 18 months after his removal, then the Board will also order a withholding of federal funds in an amount equal to two years of Camillieri's salary. 5 U.S.C. § 1506(a)(2).

The Special Counsel is ORDERED to notify the Board within 30 days of this final decision whether respondent Camillieri has been removed as ordered, unless this decision is stayed and respondent is suspended in accordance with 5 U.S.C. § 1508. It is FURTHER ORDERED that, after the first submission, the Special Counsel shall thereafter submit to the Board, at three six-month intervals, evidence that respondent has not been reemployed by any state or local agency in the State of Connecticut for a period of 18 months, as provided in 5 U.S.C. § 1506.

This is the final decision and order of the Merit Systems Protection Board.

FOR THE BOARD:

[signature illegible]
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this FINAL DECISION AND ORDER was sent today:

By certified mail to:

Stephen B. Delaney, Esquire
Delaney & Delaney
651 New Britain Avenue
Hartford, CT 06106

Wayne H. Camillieri
114 Mapleton Street
Hartford, CT 06114

Honorable James G. Harris, Jr.
Commissioner
Connecticut Department of
Human Resources
1049 Asylum Avenue
Hartford, CT 06105

By regular mail to:

Robert E. Walsh, Esquire
Robert B. Teitelman, Esquire
Assistant Attorneys General
State of Connecticut
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Hartford, CT 06114

Office of Personnel Management
Attn: Appellate Policies Branch
1900 E Street, N.W., Room 7635
Washington, DC 20415

By hand to:

Robert H. Stern, Esquire
Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, DC 20419

Chief Administrative Law Judge Reidy
Merit Systems Protection Board
1102 Vermont Avenue, N.W.
Washington, DC 20419

5/12/87
(Date)

[signature illegible]
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL, Petitioner, v. WAYNE H. CAMILLIERI and CONNECTICUT DEPARTMENT OF HUMAN RESOURCES, Respondents.	) DOCKET NUMBER) HQ12068610010)))) DATE: SEP 29 1987))))

Robert H. Stern, Esquire, for petitioner.

Robert B. Teitelman, Esquire, for respondent Connecticut Department of Human Resources.

Stephen B. Delaney, Esquire, for respondent Camillieri.

BEFORE
Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

ORDER AND CERTIFICATION

In this case of first impression, the Office of the Special Counsel (OSC) has requested the Board, under the Hatch Political Activities Act (Hatch Act), 5 U.S.C. § 1506(a), to direct the Office of Child Support Enforcement, United States Department of Health and Human Services (HHS) to withhold federal funds from the Connecticut Department of Human Resources (DHR). The genesis of the request is the refusal of DHR to comply with an order of the Board, issued

on May 12, 1987, directing the removal of Wayne H. Camillieri.

In that order, the Board found that Mr. Camillieri, an individual employed by DHR in a position principally funded by several federal agencies, was a candidate for councilman in a Democratic primary election in Hartford, Connecticut on September 10, 1985, in violation of the Hatch Act, 5 U.S.C. § 1502(a)(3). The Board ordered respondent Camillieri removed from his position.

On June 10, 1987, DHR informed OSC that Mr. Camillieri would not be removed. Accordingly, OSC requested the Board to order the withholding of federal funds from the state employing agency.

Respondent DHR opposes OSC's request arguing that the withholding order should not issue because the Board's May 12, 1987, removal order is not "final" in that both respondents, pursuant to 5 U.S.C. § 1508, have sought review of that order in the United States District Court for the District of Connecticut. Further, DHR requests, in the event the Board rejects its argument against the issuance of a withholding order, that the Board either stay the withholding order pending judicial review or delay notifying the federal agency that will withhold the funds of the order for 30 days. The 30-day delay is requested so that respondents have "the opportunity to consider whether or not to petition the federal court system to review the withholding order, and whether or not to seek a stay of the withholding order from the federal courts."

Respondent Camillieri has not responded to OSC's request, although given the opportunity to do so by a Board order issued June 25, 1987.

Respondent DHR's argument, that the Board's May 12, 1987, removal order is not "final," is irrelevant to the question of whether a withholding order should issue. The Board is

mandated by statute to issue a withholding order whenever a state employee is not removed within 30 days of notice that the Board has determined that he has violated the Hatch Act and that his removal is warranted. 5 U.S.C. § 1506. The fact that respondents have filed an appeal in district court does not alter the Board's statutory mandate. The institution of judicial proceedings does not stay the Board's determination unless (1) the court specifically orders the stay; and (2) the employee is suspended from his office while the proceedings are pending. 5 U.S.C. § 1508. There being no court-ordered stay of the Board's decision in effect, the Board is required by 5 U.S.C. § 1506 to issue a withholding order and, therefore, DHR's argument against its issuance must fail.

DHR's next request is that the Board stay the withholding order once it is issued. In its discretion, the Board may stay the enforcement of a final decision pending judicial review. 5 U.S.C. § 705; *In Re Frazier,* 1 M.S.P.R. 280 (1979). Whether such a stay is issued, however, depends on an analysis of four factors:

1. Likelihood of success on appeal;

2. Irreparable harm;

3. Substantial harm to other interested parties; and

4. The public interest.

Berard v. Office of Personnel management, 24 M.S.P.R. 347, 349 (1984). In each case the Board balances the likelihood of success on appeal with the other three factors. In those cases where the last three factors strongly favor the issuance of a stay, a stay will be issued if a serious legal question exists on the merits. If support for a stay by the last three factors is slight, however, a stay will be issued only if the possibility for success on appeal is strong. *Id.*

Respondent DHR supports its request for a stay by claiming that the Board's removal order raises serious constitutional questions regarding the Hatch Act. This assertion only addresses the first factor in the Board's analysis of whether a stay should be issued: the likelihood of success on appeal. Respondent's arguments regarding the constitutionality of the Hatch Act were advanced repeatedly during the course of the proceedings before the Board. As noted in the Board's December 18, 1986, recommended decision, which was affirmed and adopted in the Board's May 12, 1987, final decision, the Supreme Court has consistently determined that the provisions of the Hatch Act are constitutional. Therefore, we conclude that respondent DHR has failed to demonstrate that the possibility for success on appeal is strong. Because no other arguments have been advanced by respondent DHR in regard to whether a stay should issue, no further analysis on the part of the Board is possible, and DHR's request for a stay must be rejected.

Respondent DHR's final request is that the Board delay for 30 days notifying the federal agency that will withhold the funds. Respondent offers no support or precedent for this request which runs contrary to the Board's statutory mandate regarding the issuance of withholding orders. 5 U.S.C. § 1506. Therefore, this request must also be rejected.

Based on the foregoing analysis, the request of the Office of the Special Counsel, to withhold federal funds from the State employing agency, is GRANTED; the requests of the Connecticut Department of Human Resources, to stay the withholding order, or to delay notifying the federal agency that will withhold the funds of the order for 30 days, are DENIED.

In accordance with 5 U.S.C. § 1506(a), the Board hereby ORDERS that an amount equal to 2 years' pay at the rate respondent Camillieri was receiving at the time of the violation shall be withheld from the Connecticut Department of Human Resources by the following:

Wayne A. Stanton
Director
Office of Child Support Enforcement
U.S. Department of Health and
Human Services
330 Independence Avenue, S.W.
Room 5600
Washington, DC 20201

Based on the parties' Joint Stipulation of Fact No. 9, respondent Camillieri's pay rate at the time of his violation in 1985 was $45,075 annually. Therefore, it is ORDERED that a total of $90,150 be withheld by HHS from DHR.

The Board hereby CERTIFIES this Order to the appropriate parties.

FOR THE BOARD:

[signature illegible]
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Wayne H. Camillieri
114 Mapleton Street
Hartford, CT 06106

Robert B. Teitelman
Assistant Attorney General
State Office Building — Room 147
165 Capitol Avenue
Hartford, CT 06114

Stephen B. Delaney, Esquire
Delaney & Delaney
651 New Britain Avenue
Hartford, CT 06106

Honorable James G. Harris, Jr.
Commissioner
Connecticut Department of
Human Resources
1049 Asylum Avenue
Hartford, CT 06105

Wayne A. Stanton
Director
Office of Child Support Enforcement
U.S. Department of Health and
Human Services
330 Independence Avenue, S.W.
Room 5600
Washington, D.C. 20201

By regular mail to:

Office of Personnel Management
Attn: Appellate Policies Branch
1900 E Street, N.W., Room 7635
Washington, DC 20415

By hand to:

Robert H. Stern, Esquire
Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, DC 20419

9/29/87
(Date)

[signature illegible]
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

SPECIAL COUNSEL, Petitioner	) DOCKET NUMBER) HQ12068710008
v.	) DATE: *September 24, 1987*
JACK I. WINKELMAN, STATE OF CONNECTICUT, AND DEPARTMENT OF HUMAN RESOURCES, Respondents.	)

RECOMMENDED DECISION

Robert H. Stern, Esquire, for Petitioner.

Barbara J. Collins, Esquire, for Respondent Winkelman.

Robert B. Teitelman, Esquire, for Respondent State of Connecticut.

BEFORE
Edward J. Reidy
Chief Administrative Law Judge

I. INTRODUCTION

In a Complaint for Disciplinary Action filed March 6, 1987 under 5 U.S.C. § 1206(e)(1)(B), (g)(1) and 1504, the Office of Special Counsel (SC) of the Merit Systems Protection Board (Board) charges Jack I. Winkelman has violated the Hatch Political Activities Act by his candidacy for partisan

elective office. In particular, SC alleges that respondent Winkelman, said to be a state employee covered by the Hatch Act, ran for elective office as the candidate of the Republican party for the position of Judge of Probate for the Town of Wallingford, Connecticut in the general election of November 4, 1986. On account of this violation, his removal from office is sought.

The Board assigned this matter to me for processing pursuant to 5 U.S.C. § 557. Respondents waived any rights to an oral hearing and agreed that the complaint should be disposed of based upon written submissions and argument. The stipulated facts, attachments thereto, and briefs filed by all the parties have been considered in my disposition of this matter.

II. FACTUAL BACKGROUND

The basic facts are uncontroverted. Throughout 1986,[1] respondent Winkleman was principally employed as Human Resource Development Senior Representative with the Connecticut Department of Human Resources (DHR) in the Monitoring and Evaluation Division. DHR is state executive agency which administered approximately $60 million in Federal program grants during 1986. This sum constituted approximately two-thirds of all program funding administered by DHR. In his role with that agency Winkelman reviewed and evaluated the management and effectiveness of community and social service programs funded in large part by Federal funds.

On July 25, officials of the Town of Wallingford were notified that the Republican Party had endorsed Winkelman as a candidate for Probate Judge in the upcoming election of November 4. Ex. P-1. On July 27 Winkelman sought from the Personnel Division of DHR advice as to whether his candidacy might violate the Hatch Act. The Personnel Division,

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[1] Unless otherwise stated, all dates herein are 1986.

in turn, on August 4 sought advice from the Office of Special Counsel concerning Winkelman's candidacy. Ex. P-2, 3. Winkleman filed his certified designation of candidacy on August 27. Ex. P-4 SC replied on September 2 expressing the opinion Winkelman was covered by the Hatch Act and urging him to withdraw his candidacy. SC's response was forwarded to respondent on September 9. DHR also told Winkleman that if he decided to run despite the advice given, SC would be notified. Ex. P-5

On October 9 SC sent Winkleman a warning letter — received by him on October 16 — about his candidacy. P-8 Upon receipt of the warning letter, Winkleman sought from SC additional time to respond to the warning but at no time prior to the general election of November 4 did he or any representative of his contact SC. Stip. 13, 14

Winkleman was a candidate for Probate Judge on November 4 but lost the election. P-6, P-7, P-9, P-10 As such Winkleman engaged in activities which related to his candidacy in that he solicited votes, authorized advertisements and incurred campaign expenses in furtherance of his race to become Probate Judge. P-10; Stip. 15 Throughout the time he was a candidate — and to this day — respondent has remained an employee of DHR. Stip 17, 18.

ARGUMENT

All the parties filed briefs and SC filed a reply brief. SC articulates the reasons why the evidence shows Winkelman's political activity violates the Hatch Act and gives reasons why the violation warrants removal. It draws particular attention to the case of *Special Counsel v. Camillieri*, 33 M.S.P.R. 565 (1987), wherein in the Board found removal of an employee State of Connecticut DHR was appropriate for having been a candidate for a political office in a partisan election.

The arguments of respondent State of Connecticut and Winkelman are identical in large measure, for Winkelman adoped the arguments of the State and then added some of his own. Respondents maintain that to apply the Hatch Act to the facts of this complaint would be contrary to constitutional principles embodied in the First Amendment, the Tenth Amendment and the constitutional guarantee of equal protection of the laws. They urge the complaint be dismissed. In the alternative, Connecticut says these serious constitutional questions should impel the conclusion that even if a violation is found, removal is not warranted.

A violation of the First Amendment is shown, respondents insist, because by compelling state employees the refrain from being candidates for political office — under pain of removal — SC has trampled upon their protected rights of freedom of association. They add that applying the Hatch Act here not only has a chilling effect on the constitutional rights of state employees, but would substantially penalize the States themselves for honoring the constitutional rights of its employees.

Respondents see a violation of the Tenth Amendment — which protects the roles of states as separate sovereigns — because this complaint amounts to an impermissible Federal intrusion into the internal affairs of the State.

In insisting that this action violates the constitutional guarantee of equal protection of the laws, respondents argue the Hatch Act excepts from its coverage some employees[2], while at the same time includes others, as Winkleman, "similarly situated." At that, Connecticut adds, the application of the Hatch Act herein is unconstitutional because it is based upon a minimal federal interest in state employees.

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[2] For example, the Governor, Lieutenant Governor, individuals holding elective office and certain educational or research, institutions 5 U.S.C. §§ 1502 (2); 1501(4)(b).

The arguments advanced here by the State of Connecticut bear a striking resemblance to those raised in *Special Counsel v. Camillieri,* where the Board find that candidacy of state DHR employee for partisan political office violated the Hatch Act and warranted his removal. For reasons to be explained, I find the same conclusion is warranted here. As I stated in my recommended decision in *Camillieri,* administrative agencies lack the authority to determine the constitutionality of statutes. *Fiorillo v. Department of Justice,* 795 F.2d 1544 (Fed. Cir. 1986); *Malone v. Department of Justice,* 14 M.S.P.R. See also 4 Davis, Administrative Law Treatise § 26:6 (1983) Be that as it may, it seems beyond contradiction that these constitutional arguments lack merit. "Neither the First Amendment nor any other provision of the Constitution invalidates [the Hatch Act's bar of certain] partisan political conduct of covered employees." *Civil Service Commission v. Letter Carriers,* 413 U.S. 548, 556 (1973). *See also Special Counsel v. Daniel,* 15 M.S.P.R. 636 (1983).

The Supreme Court found in *Oklahoma v. United States Civil Service Commission,* 330 U.S. 127, 143 (1947) that the United States has the power to fix the terms upon which its money allotments to the States shall be disbursed and held that the Hatch Act violated neither the Tenth Amendment or a state's sovereignty. In that same decision, citing *United Public Workers of America v. Mitchell,* 330 U.S. 75 (1947), the court also sustained the Hatch Act against claims that political activity restrictions abridged First Amendment rights. Moreover, in *Broadrick v. Oklahoma,* 413 U.S. 601, 607 n.5 (1973) the Court disposed of an argument that a state Hatch Act discriminated under the Fourteenth Amendment between covered classified state employees and exempted unclassified state employees.

DISCUSSION

The preponderant evidence shows that Winkleman is a covered employee for the purposes of the Hatch Act because he is principally employed by a state agency funded by federal

loans or grants. 5 U.S.C. § 1501(4); *Special Counsel v. Dunton*, 5 M.S.P.R. 147, (1981); and *Special Counsel v. Hayes*, 16 M.S.P.R. 166, (1983). In fact, Winkelman does not dispute that he is covered by the Act.

Nor does respondent question what the preponderant evidence also shows: he was a candidate for elective public office in a partisan election in 1986. As a candidate for the position of Probate Judge for the Town of Wallingford, Connecticut, respondent actively compaigned for that office and received votes in an election which was partisan.

Respondent insists that the Hatch Act was never intended to apply to the nonpartisan position of Probate Court Judge. Maintaining that a Judge would be compelled to act in a non-partisan manner by the very nature of his position respondent contends that this complaint should be dismissed as being but a *de minimus* charge.

This argument lacks merit. Merely because a particular office may be viewed as being independent of political party affairs and partisan influences does not exempt a candidate in a partisan election for that position from the provisions of the Hatch Act. Indeed, most public offices require service for the overall public good and not to a particular political party. The offense is in the candidacy itself. What the preponderant evidence shows is that respondent Winkleman has violated the Hatch Act as alleged because he was a candidate for office in a partisan election.

PENALTY

The penalty provided for violating 5 U.S.C. § 1502(a), as has been shown here, is removal. 5 U.S.C. § 1505(2); *Special Counsel v. Yoho*, 15 M.S.P.R. 409, 413 (1983). The cited case also stands for the proposition that the Board may determine — because of the circumstances of a particular case — that a sustained violation does not necessarily warrant removal.

First of all, candidacy in a partisan election has been held to be a conspicuous and serious violation of the Act. *See Matter of Murphy,* 1 M.S.P.R. 48 (1979); *Matter of Gridle,* 1 M.S.P.R. 36 (1979). Such a violation has been held to warrant removal in the absence of mitigation. *Fischer & Rensselaer County, New York,* 3 PAR 383, 384 (1985).

In his concurring expression in *Special Counsel v. Kehoe,* 33 M.S.P.R. 56, 67 (1987) aff'd in part, rev'd in part State of Minnesota, Department of Jobs and Training v. United States Merit Systems Protection Board, Gv. No. 4-87-284 (D. Minn. June 23, 1987) Chairman Levinson wrote, in pertinent part:

> In enacting the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, Title IV, § 401(a), 88 Stat. 1290. Congress revised one of the limitations on a State employee's political involvement by replacing the phrase "take an active part in political management or in political campaigns" with "be a candidate for elective office." Through this amendment congress demonstrated an unqualified and unmistakable intent to restrict certain State employees, including those in positions like respondent's [principally employed in connection with an activity which is financed in whole or part by the United States or a Federal agency] from partisan candidacy.

Respondent's actions fly in the teeth of this provision. Not only that, but this respondent chose to ignore all warnings that he was in violation and was willing to take his chances. Removal is called for. The violation is clear and serious.

FINDINGS

Based upon my analysis of all the evidence of record, I find that the preponderant evidence shows a violation as alleged and thus recommend the Board enter an order finding that:

(1) Jack I. Winkleman knowingly violated 5 U.S.C. § 1502(a)(3); and

(2) the violation was of such scope and effect as to warrant removal of respondent under 5 U.S.C. § 1505.

The parties have 30 days from receipt of this recommended decision to file any exceptions. Exceptions should be filed with the Office of the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Room 802, Washington, D.C. 20419. 5 C.F.R. § 1201.129(B)

/s/ Edward J. Reidy
Edward J. Reidy
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice and Order was sent this day by first-class mail:

Jack I. Winkleman
141 South Airline Road
Wallingford, CT 06492

Barbara J. Collins
Law Offices of
J. William Gagne, Jr.,
and Associates
207 Washington Street
Hartford, CT 06106

Susan T. Pearlman
Associate Attorney General
30 Trinity Street
Hartford, CT 06106

Robert E. Walsh
Robert B. Teitelman
Assistant Attorneys General
State Office Building, Room 147
165 Capitol Avenue
Hartford, CT 06106

Robert H. Stern
Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 1137
Washington, D.C. 20005

Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 E. Street, N.W.
Room 7635
Washington, D.C. 20415

By intra-agency mail to:

Robert E. Taylor
Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Rm. 802
Washington, D.C. 20419

Dated: September 24, 1987

/s/ Doretha Bonds
Doretha Bonds
Legal Technician

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL, Petitioner, v. JACK I. WINKLEMAN, AND CONNECTICUT DEPARTMENT OF HUMAN RESOURCES,[1] Respondents.	) DOCKET NUMBER) HQ12068710008)) DATE: JAN 26 1988)

Barbara J. Collins, Esquire, for respondent Winkleman.

Robert B. Teitelman, Esquire, for respondent Connecticut Department of Human Resources.

Robert H. Stern, Esquire, for petitioner.

BEFORE
Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

FINAL DECISION AND ORDER

This case is before the Board on the September 24, 1987, Recommended Decision of Chief Administrative Law Judge

[1] The Board notes that when the Special Counsel charges a state employee with violations of the Hatch Political Activities Act pursuant to 5 U.S.C. § 1502, it is appropriate to name the employing state or local agency as a respondent because, under section 1505, the state or local agency has the right to appear and be heard at a hearing before the Board wherein it is determined whether a violation has occurred.

Reidy (CALJ), issued pursuant to an Office of Special Counsel complaint for disciplinary action against respondents Winkleman and the Connecticut Department of Human Resources (DHR), Mr. Winkleman's employing agency. The complaint alleged that respondent Winkleman violated the Hatch Political Activities Act (Hatch Act), 5 U.S.C. §§ 1501-08, when he was a candidate of the Republican party for the position of Judge of Probate for the Town of Wallingford, Connecticut in the general election of November 4, 1986.

The CALJ found that respondent Winkleman knowingly violated 5 U.S.C. § 1502(a)(3) by his candidacy for partisan office.[2] The CALJ also determined, in accordance with 5 U.S.C. § 1505, that the violation was of such scope and effect that removal was warranted. This determination was made after consideration of all the circumstances surrounding Mr. Winkleman's candidacy, including the Special Counsel's opinion, given in response to an inquiry initiated by Mr. Winkleman through DHR, that he was covered by the Hatch Act and that he should withdraw his candidacy; DHR's specific notice to Mr. Winkleman that the Special Counsel would be informed if he decided to proceed with his candidacy; and the Special Counsel's October 9, 1986, official warning letter to Mr. Winkleman that his candidacy violated the law.

Respondents filed exceptions to the Recommended Decision pursuant to 5 C.F.R. § 1201.129. These exceptions were

---

[2] 5 U.S.C. § 1502(a)(3) provides:

> A State or local officer or employee may not —
>
> * * * * *
>
> (3) be a candidate for elective office.

"State or local officer or employee" is defined in 5 U.S.C. § 1501(4) as:

> an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency . . .

merely a refiling of the briefs respondents submitted to the CALJ, except that respondent Winkleman added two further points in support of the argument raised in his brief that his conduct was *de minimis* and, therefore, removal was not warranted.

Respondent Winkleman's first point in further support of his *de minimis* argument is that "there is no evidence that Winkleman abused his State position." Respondent Winkleman's Exceptions, page 8. This argument is irrelevant. Abuse of a State position is not an element of proof in a Hatch Act violation, nor is the absence of actual harm to the State one of the mitigating factors considered when the determination is made whether removal is warranted. 5 U.S.C. § 1505. *See also Special Counsel v. Yoho*, 15 M.S.P.R. 409, 413 (1983).

Respondent Winkleman's second point in support of his *de minimis* argument is that under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the State of Connecticut would be required to hold a hearing prior to terminating Mr. Winkleman, if the Board ordered his removal, and that this pretermination hearing would be a sham because the removal decision would have already been made. Respondent Winkleman's Exceptions, page 8. Respondent's argument borders on the frivolous and misconstrues *Loudermill*, which held that the due process clause requires some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Id.* at 541. Assuming Mr. Winkleman has such a protected interest in his employment, the hearing conducted in this case before the CALJ, pursuant to 5 U.S.C. § 1505, afforded him the right to appear, to be heard, and to submit evidence, and therefore provided adequate protection of his due process rights. Neither *Loudermill* nor the Hatch Act can be interpreted as requiring that the State or local agency conduct a second hearing on the issue of termination if the Board finds that removal of the offending employee is warranted.

The Board has carefully considered the Recommended Decision and the record in light of the exceptions. Exceptions such as those submitted here, without specific record citations and persuasive argument of error are insufficient for the Board to overturn the CALJ's findings. *See Special Counsel v. Hoban*, 24 M.S.P.R. 154 (1984). Moreover, we find that the CALJ adequately and correctly addressed all of the issues raised. Therefore, we AFFIRM and ADOPT the Recommended Decision as the Final Decision of the Board and incorporate it herein.

Accordingly, the Connecticut Department of Human Resources is ORDERED to remove Jack I. Winkleman from his position. 5 U.S.C. § 1505.[3] Pursuant to 5 U.S.C. § 1508, respondents are hereby notified of the right to file a petition for review in the United States district court for the district in which respondent Winkleman resides within thirty days of the date of mailing of this final decision.

The Special Counsel is ORDERED to notify the Board within 30 days of this final decision whether respondent Winkleman has been removed as ordered, unless this decision is stayed and respondent is suspended in accordance with 5 U.S.C. § 1508. It is further ORDERED that, after the first submission, the Special Counsel shall thereafter submit to the Board, at three six-month intervals, evidence that respondent has not been reemployed by any state or local agency

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[3] We note that, pursuant to 5 U.S.C. § 1506(a)(1), if DHR fails to remove respondent Winkleman within 30 days after the date of this Final Decision and Order, the Board shall order the appropriate federal agency to withhold from DHR's loans or grants an amount equal to two times the annual pay Mr. Winkleman was receiving at the time of his violation. Therefore, DHR may choose to remove Mr. Winkleman or to forfeit receipt of federal funds in the amount so stated. We further note that if Mr. Winkleman is removed and then rehired in a state or local agency in Connecticut within 18 months of his removal, the Board will also order a withholding of federal funds in an amount equal to two times the annual pay Mr. Winkleman was receiving at the time of his violation. 5 U.S.C. § 1506(a)(2).

in the State of Connecticut for a period of 18 months, as provided in 5 U.S.C. § 1506.

This is the final decision and order of the Merit System Protection Board.

FOR THE BOARD: [signature illegible]
Robert E. Taylor
Washington, D.C. Clerk of the Board

CERTIFICATE OF SERVICE

I certify that this FINAL DECISION AND ORDER was sent today:

By certified mail to:

Jack I. Winkleman
141 South Airline Road
Wallingford, CT 06492

Barbara J. Collins, Esquire
Law Offices of
William Gagne, Jr.,
and Associates
207 Washington Street
Hartford, CT 06106

Honorable Elliot A. Ginsberg
Commissioner
Connecticut Department of
Human Resources
1049 Asylum Avenue
Hartford, CT 06105

By regular mail to:

Robert E. Walsh, Esquire
Robert B. Teitelman, Esquire
Assistant Attorneys General
State Office Building, Room 147
165 Capitol Avenue
Hartford, CT 06106

Mr. Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W.
Room 7635
Washington, DC 20415

By hand to:

Robert H. Stern, Esquire
Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, NW.
Washington, DC 20419

Chief Administrative Law Judge
Edward J. Reidy
Merit Systems Protection Board
1120 Vermont Avenue NW.
Washington, DC 20419

JAN 26 1988
(Date)

[signature illegible]
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL, Petitioner, v. JACK I. WINKLEMAN and CONNECTICUT DEPARTMENT OF HUMAN RESOURCES, Respondents.	) DOCKET NUMBER) HQ12068710008)) DATE: MAY 18 1988))))))

Robert H. Stern, Esquire, for petitioner.

Robert B. Teitelman, Esquire, for respondent Connecticut Department of Human Resources.

Barbara J. Collins, Esquire, for respondent Winkleman.

BEFORE
Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

ORDER AND CERTIFICATION

This case is before the Board on the February 25, 1988, request of the Office of the Special Counsel (OSC) to direct the Office of Human Development Services, U.S. Department of Health and Human Services (HHS), to withhold federal funds from the Connecticut Department of Human Resources (DHR), pursuant to the Hatch Political Activities Act (Hatch Act), 5 U.S.C. § 1506(a). The genesis of the request is the refusal of DHR to comply with an order of the Board, issued on January 26, 1988, directing the removal of Jack I. Winkleman.

In that order, the Board found that Mr. Winkleman, an individual employed by DHR in a position principally funded by federal grants, was a candidate of the Republican party for the position of Judge of Probate for the Town of Wallingford, Connecticut in the general election of November 4, 1986, in violation of the Hatch Act, 5 U.S.C. § 1502(a)(3). The Board ordered respondent Winkleman removed from his position.

On February 24, 1988, DHR informed OSC that Mr. Winkleman would not be removed. Accordingly, OSC requested the Board to order the withholding of federal funds from the state employing agency.

On February 29, 1988, respondent DHR requested an opportunity to fully brief its objections to the imposition of a withholding order. The Clerk of the Board granted DHR's request by telephone, giving DHR and respondent Winkleman 14 days to file their objections and OSC 14 days to reply to these objections. Respondent DHR filed its objections on March 14, 1988. OSC filed its response to these objections on March 18, 1988.

Respondent DHR opposes OSC's request, arguing that the withholding order should not issue because the Board's January 26, 1988, removal order is not "final" in that both respondents, pursuant to 5 U.S.C. § 1508, have sought review of that order in the United States District Court for the District of Connecticut. Further, DHR requests, in the event the Board rejects its argument against the issuance of a withholding order, that the Board either stay the withholding order pending judicial review or delay for 30 days giving notice of the order to the federal agency that will withhold the funds. The 30-day delay is requested so that respondents have "the opportunity to consider whether or not to petition the federal court system to review the withholding order, and whether or not to seek a stay of the withholding order from the federal courts." Memorandum in Opposition to Request For Withholding Order Filed By Special Counsel, page 3.

Respondent DHR's argument that the Board's January 26, 1988, removal order is not "final" is irrelevant to the question of whether a withholding order should issue. The Board is mandated by statute to issue a withholding order whenever a state employee is not removed within 30 days of notice that the Board has determined that he has violated the Hatch Act and that his removal is warranted. 5 U.S.C. § 1506. The fact that respondents have filed an appeal in district court does not alter the Board's statutory mandate. The institution of judicial proceedings does not stay the Board's determination unless (1) the court specifically orders the stay; and (2) the employee is suspended from his office while the proceedings are pending. 5 U.S.C. § 1508. There being no court-ordered stay of the Board's decision in effect, the Board is required by 5 U.S.C. § 1506 to issue a withholding order and, therefore, DHR's argument against its issuance must fail.

DHR's next request is that the Board stay the withholding order once it is issued. In its discretion, the Board may stay the enforcement of a final decision pending judicial review. *See, e.g., In Re Frazier,* 1 M.S.P.R. 280 (1979). Whether such a stay is issued, however, depends on an analysis of four factors:

1. Likelihood of success on appeal;

2. Irreparable harm;

3. Substantial harm to other interested parties; and

4. The public interest.

Berard v. Office of Personnel Management, 24 M.S.P.R. 347, 349 (1984). In each case the Board balances the likelihood of success on appeal with the other three factors. In those cases where the last three factors strongly favor the issuance of a stay, a stay will be issued if a serious legal question exists on the merits. If support for a stay by the last three factors is slight, however, a stay will be issued only if the possibility for success on appeal is strong. *Id.*

Respondent DHR supports its request for a stay by claiming that the Board's removal order raises serious constitutional questions regarding the Hatch Act. This assertion only addresses the first factor in the Board's analysis of whether a stay should be issued: the likelihood of success on appeal. Respondent's arguments regarding the constitutionality of the Hatch Act were advanced repeatedly during the course of the proceedings before the Board. As noted in the Board's September 24, 1987, recommended decision, which was affirmed and adopted in the Board's January 26, 1988, final decision, the Supreme Court has consistently determined that the provisions of the Hatch Act are constitutional. Therefore, we conclude that respondent DHR has failed to demonstrate that the possibility for success on appeal is strong. Because no other arguments have been advanced by respondent DHR in regard to whether a stay should issue, no further analysis on the part of the Board is possible, and DHR's request for a stay must be rejected.

Respondent DHR's final request is that the Board delay for 30 days notifying the federal agency that will withhold the funds. Respondent offers no support or precedent for this request, which runs contrary to the Board's statutory mandate regarding the issuance of withholding orders. 5 U.S.C. § 1506. Therefore, this request must also be rejected.

Based on the foregoing analysis, the request of the Office of the Special Counsel to withhold federal funds from the State employing agency is GRANTED; the request of the Connecticut Department of Human Resources to stay the withholding order or to delay notifying the federal agency that will withhold the funds of the order for 30 days, is DENIED.

In accordance with 5 U.S.C. § 1506(a), the Board hereby ORDERS that an amount equal to 2 years' pay at the rate respondent Winkleman was receiving at the time of the violation shall be withheld from the Connecticut Department of Human Resources by the following:

G. Barry Nielsen
Director
Office of Policy, Planning and Legislation
U.S. Department of Health and Human Services
Office of Human Development Services
330 Independence Avenue, SW.
Washington, DC 20201

Based on the parties' Joint Stipulation of Fact No. 5, respondent Winkleman's pay rate at the time of his violation in 1986 was $30,448 annually. Therefore, it is ORDERED that a total of $60,896 be withheld by HHS from DHR.* It is further ORDERED that within 45 days of the date of this Order, OSC shall file with the Clerk of the Board a report on the status of HHS's compliance with this Order.

The Board hereby CERTIFIES this Order to the appropriate parties.

FOR THE BOARD: [signature illegible]
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER AND CERTIFICATION was sent today:

By certified mail to: Jack I. Winkleman
141 South Airline Road
Wallingford, CT 06492

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* In compliance with 5 U.S.C. § 1506(b), HHS is required to withhold the specified amount 30 days after the order becomes final. According to 5 U.S.C. § 1506(b), this order becomes final 30 days after it is mailed.

Robert B. Teitelman
Assistant Attorney General
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Barbara J. Collins, Esquire
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Honorable James G. Harris, Jr.
Commissioner
Connecticut Department of
Human Resources
1049 Asylum Avenue
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G. Barry Nielsen
Director
Office of Policy, Planning
and Legislation
U.S. Department of Health and
Human Services
Office of Human Development Services
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Washington, DC 20201

By regular
mail to:

Mr. Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 E Street, NW., Room 7635
Washington, DC 20415

By hand to: Robert H. Stern, Esquire
Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, NW.
Washington, DC 20419

MAY 18 1988
(Date)

[signature illegible]
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, DEPT. OF HUMAN RESOURCES and WAYNE H. CAMILLIERI	
v.	CIVIL NO. H-87-406 (JAC)
U.S. MERIT SYSTEMS PROTECTION BOARD and LYNN R. COLLINS, Special Counsel, U.S. Merit System Protection Board	
STATE OF CONNECTICUT, DEPT. OF HUMAN RESOURCES and WAYNE H. CAMILLIERI	
v.	CIVIL NO. H-87-779 (JAC)
UNITED STATES MERIT SYSTEMS PROTECTION BOARD and MARY F. WIESEMAN, Special Counsel, United States Merit Systems Protection Board	
STATE OF CONNECTICUT, DEPT. OF HUMAN RESOURCES and JACK I. WINKLEMAN	
v.	CIVIL NO. H-88-65 (JAC)
UNITED STATES MERIT SYSTEMS PROTECTION BOARD and MARY F. WIESMAN, Special Counsel, United States Merit Systems Protection Board	
STATE OF CONNECTICUT, DEPT. OF HUMAN RESOURCES and JACK I. WINKLEMAN	
v.	CIVIL NO. H-88-335 (JAC)
UNITED STATES MERIT SYSTEMS PROTECTION BOARD and MARY F. WIESMAN, Special Counsel, United States Merit Systems Protection Board	

SUMMARY JUDGMENT

These actions having come on for consideration on cross-motions for summary judgment before the Honorable José A. Cabranes, United States District Judge, and the issues having been duly considered and a Ruling on Cross-Motions for Summary Judgment having been filed on July 24, 1989, denying plaintiffs' motions and granting respondent United States Merit Systems Protection Board motions,

It is ORDERED, ADJUDGED and DECREED that summary judgment be and is hereby entered in favor of the respondent United States Merit Systems Protection Board in each of the above-entitled actions (these actions against defendants Lynn R. Collins and Mary F. Wieseman, Special Counsel, United States Merit Systems Protection Board having been withdrawn on June 26, 1989.)

Dated at New Haven, Connecticut, this 26th day of July, 1989.

KEVIN F. ROWE

CLERK, UNITED STATES
DISTRICT COURT

By /s/ Frances J. Consiglio
DEPUTY IN CHARGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, DEPARTMENT OF HUMAN RESOURCES & WAYNE H. CAMILLIERI v. UNITED STATES MERIT SYSTEMS PROTECTION BOARD	CIVIL ACTION NO. H87-406 (JAC)
STATE OF CONNECTICUT, DEPARTMENT OF HUMAN RESOURCES & WAYNE H. CAMILLIERI v. UNITED STATES MERIT SYSTEMS PROTECTION BOARD	CIVIL ACTION NO. H87-779 (JAC)
STATE OF CONNECTICUT, DEPARTMENT OF HUMAN RESOURCES & JACK I. WINKLEMAN v. UNITED STATES MERIT SYSTEMS PROTECTION BOARD	CIVIL ACTION NO. H88-65 (JAC)
STATE OF CONNECTICUT, DEPARTMENT OF HUMAN RESOURCES & JACK I. WINKLEMAN v. UNITED STATES MERIT SYSTEMS PROTECTION BOARD	CIVIL ACTION NO. H88-335 (JAC) AUGUST 3, 1989

JOINT NOTICE OF APPEAL

Notice is hereby given that the State of Connecticut, Department of Human Resources, Wayne H. Camillieri, and Jack I. Winkleman, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment

of the United States District Court for the District of Connecticut (Cabranes, J.) entered in these four consolidated actions. The District Court ordered the entry of judgment on the 24th day of July, 1989, and judgment was entered by the clerk on the 26th day of July, 1989.

PLAINTIFF
WAYNE H. CAMILLIERI

BY: HIS ATTORNEY

/s/ Stephen B. Delaney
Stephen B. Delaney
Silvester, Daly & Delaney
651 New Britain Avenue
Hartford, CT 06106
(203) 953-4109

PLAINTIFF
JACK I. WINKLEMAN

BY: HIS ATTORNEY

/s/ Barbara J. Collins
Barbara J. Collins
Gagne and Collins
207 Washington Street
Hartford, CT 06106
(203) 522-5049

PLAINTIFF
STATE OF CONNECTICUT,
DEPARTMENT OF HUMAN
RESOURCES

BY: CLARINE NARDI RIDDLE
DEPUTY ATTORNEY GENERAL
(ACTING ATTORNEY GENERAL)

Robert E. Walsh
Assistant Attorney General

/s/ Robert B. Teitelman
Robert B. Teitelman
Assistant Attorney General
P.O. Box 120
Hartford, CT 06101
(203) 566-2090

CERTIFICATION

I hereby certify that a copy hereof was mailed this date, first class postage prepaid, to the following: John B. Hughes, Assistant United States Attorney, 141 Church Street, P.O. Box 1824, New Haven, CT 06508; Sheila Mooney, Trial Attorney, U.S. Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, DC 20419; Steven B. Delaney, Silvester, Daly & Delaney, 651 New Britain Avenue, Hartford, CT 06106; and, Barbara J. Collins, Gagne and Collins, 207 Washington Street, Hartford, CT 06106.

/s/ Robert B. Teitelman
Robert B. Teitelman
Assistant Attorney General

TEXT OF CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THIS CASE

Text of U.S. Const. Amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Text of U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Text of U.S. Const. Amend. X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Text of U.S. Const. Amend. XIV, § 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Text of 5 U.S.C. § 1501, et seq.:

§ 1501. Definitions

For the purposes of this chapter —

(1) "State" means a State or territory or possession of the United States;

(2) "State or local agency" means the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof;

(3) "Federal agency" means an Executive agency or other agency of the United States, but does not include a member bank of the Federal Reserve System; and

(4) "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include —

(A) an individual who exercised no functions in connection with that activity; or

(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic or cultural organization.

§ 1502. **Influencing elections; taking part in political campaigns; prohibitions; exceptions**

(a) A State or local officer or employee may not —

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(3) be a candidate for elective office.

(b) A State or local officer or employee retains the right to vote as he chooses and to express his opinions on political subjects and candidates.

(c) Subsection (a)(3) of this section does not apply to —

(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) the mayor of a city;

(3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil-service system; or

(4) an individual holding elective office.

§ 1503. Nonpartisan candidacies permitted

Section 1502(a)(3) of this title does not prohibit any state or local officer or employee from being a candidate in any election if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.

§ 1504. Investigations; notice of hearing

When a Federal agency charged with the duty of making a loan or grant of funds of the United States for use in an activity by a State of local officer or employee has reason to believe that the officer or employee has violated section 1502 of this title, it shall report the matter to the Special Counsel. On receipt of the report or on receipt of other information which seems to the Special Counsel to warrant an investigation, the Special Counsel shall investigate the report and such other information and present his findings and any charges based on such findings to the Merit Systems Protection Board, which shall —

(1) fix a time and place for a hearing; and

(2) send, by registered or certified mail, to the officer or employee charged with the violation and to the State or local agency employing him a notice setting forth a summary of the alleged violation and giving the time and place of the hearing.

The hearing may not be held earlier than 10 days after the mailing of the notice.

§ 1505. Hearings; adjudications; notice of determinations

Either the State or local officer or employee or the State or local agency employing him, or both, are entitled to appear with counsel at the hearing under section 1504 of this title, and be heard. After this hearing, the Merit Systems Protection Board shall —

(1) determine whether a violation of section 1502 of this title has occurred;

(2) determine whether the violation warrants the removal of the officer or employee from his office or employment; and

(3) notify the officer or employee and the agency of the determination by registered or certified mail.

§ 1506. Orders; withholding loans or grants; limitations

(a) When the Merit Systems Protection Board finds —

(1) that a State or local officer or employee has not been removed from his office or employment within 30 days after notice of a determination by the Board that he has violated section 1502 of this title and that the violation warrants removal; or

(2) that the State or local officer or employee has been removed and has been appointed within 18 months after his removal to an office or employment in the same State or in a State or local agency which does not receive loans or grants from a Federal agency;

the Board shall make and certify to the appropriate Federal agency an order requiring that agency to withhold from its loans or grants to the State or local agency to which notice was given an amount equal to 2 years' pay at the rate the

officer or employee was receiving at the time of the violation. When the State or local agency to which appointment within 18 months after removal has been made is one that received loans or grants from a Federal agency, the Board order shall direct that the withholding be made from that State or local agency.

(b) Notice of the order shall be sent by registered or certified mail to the State or local agency from which the amount is ordered to be withheld. After the order becomes final, the Federal agency to which the order is certified shall withhold the amount in accordance with the terms of the order. Except as provided by section 1508 of this title, a determination or order of the Board becomes final at the end of 30 days after mailing the notice of the determination or order.

(c) The Board may not require an amount to be withheld from a loan or grant pledged by a State or local agency as security for its bonds or notes if the withholding of that amount would jeopardize the payment of the principal or interest on the bonds or notes.

§ 1507. Subpenas and depositions

(a) The Merit Systems Protection Board any [sic] require by subpena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter before it as a result of this chapter. Any member of the Board may sign subpenas, and members of the Board and its examiners when authorized by the Board may minister oaths, examine witnesses, and receive evidence. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States at the designated place of hearing. In case of disobedience to a subpena, the Board may invoke the aid of a court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. In case of contumacy or refusal to obey a subpena issued to a

person, the United States District Court within whose jurisdiction the inquiry is carried on may issue an order requiring him to appear before the Board, or to produce documentary evidence if so ordered, or to give evidence concerning the matter in question; and any failure to obey the order of the court may be punished by the court as a contempt thereof.

(b) The Board may order testimony to be taken by deposition at any stage of a proceeding or investigation before it as a result of this chapter. Depositions may be taken before an individual designated by the Board and having the power to administer oaths. Testimony shall be reduced to writing by the individual taking the deposition, or under his direction, and shall be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence before the board as provided by this section.

(c) A person may not be excused from attending and testifying or from producing documentary evidence or in obedience to a subpena on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify, or produce evidence, documentary or otherwise, before the Board in obedience to a subpena issued by it. A person so testifying is not exempt from prosecution and punishment for perjury committed in so testifying.

§ 1508. Judicial review

A party aggrieved by a determination or order of the Merit Systems Protection Board under section 1504, 1505, or 1506 of this title may, within 30 days after the mailing of notice of the determination or order, institute proceedings for review thereof by filing a petition in the United States District Court for the district in which the State or local officer or employee resides. The institution of the proceedings does not operate as a stay of the determination or order unless

—

(1) the court specifically orders a stay; and

(2) the officer or employee is suspended from his office or employment while the proceedings are pending.

A copy of the petition shall immediately be served on the Board, and thereupon the Board shall certify and file in the court a transcript of the record on which the determination or order was made. The court shall review the entire record including questions of fact and questions of law. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that the additional evidence may materially affect the result of the proceedings and that there were reasonable grounds for failure to adduce this evidence in the hearing before the Board, the court may direct that the additional evidence be taken before the Board in the manner and on the terms and conditions fixed by the court. The Board may modify its findings of fact or its determination or order in view of the additional evidence and shall file with the court the modified findings, determination, or order; and the modified findings of fact, if supported by substantial evidence, are conclusive. The court shall affirm the determination or order, or the modified determination or order, if the court determines that it is in accordance with law. If the court determines that the determination or order, or the modified determination or order, is not in accordance with law, the court shall remand the proceeding to the Board with directions either to make a determination or order determined by the court to be lawful or to take such further proceedings as, in the opinion of the court, the law requires. The judgment and decree of the court are final, subject to review by the appropriate United States Court of Appeals, as in other cases, and the judgment and decree of the court of appeals are final, subject to review by the Supreme Court of the United States on certiorari or certification as provided by section 1254 of title 28. If a provision of this section is held to be invalid as applied to a party by a determination or order of the Board, the determination or order becomes final and effective as to that party as if the provision had not been enacted.

Text of 28 U.S.C. § 1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Text of 28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court for Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Text of 28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Text of 28 U.S.C. § 2101(c):

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Text of Conn. Gen. Stat. § 5-266a, et seq.:

Sec. 5-266a. Political activities of classified state employees and judicial department employees. Candidacy for office. Leave of absence or resignation upon taking elective office. (a) No person employed in the classified state service or in the judicial department may (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office; (2) directly or indirectly coerce, attempt to coerce, command or advise a state or local officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes.

(b) A person employed in said classified service or judicial department retains the right to vote as he chooses and to express his opinions on political subjects and candidates and shall be free to participate actively in political management and campaigns. Such activity may include but shall not be limited to, membership and holding office in a political party, organization or club, campaigning for a candidate in a partisan election by making speeches, writing on behalf of the candidate or soliciting votes in support of or in opposition to a candidate and making contributions of time and money to political parties, committees or other agencies engaged in political action, except that no such employee shall

engage in such activity while on duty or within any period of time during which such employee is expected to perform services for which he receives compensation from the state, and no such employee shall utilize state funds, supplies, vehicles, or facilities to secure support for or oppose any candidate, party, or issue in a political partisan election. Notwithstanding the provisions of this subsection, any person employed in the classified state service or in the judicial department may be a candidate for a state or municipal office, in any political partisan election. No person seeking or holding municipal office or seeking state office in accordance with the provisions of this subsection shall engage in political activity or in the performance of the duties of such office while on state duty or within any period of time during which such person is expected to perform services for which such person receives compensation from the state. The state ethics commission shall establish by regulation definitions of conflict of interest which shall preclude persons in the classified state service or in the judicial department from holding elective office.

(c) Any person employed in the classified state service or in the judicial department who leaves such service to accept a full-time elective municipal office shall be granted a personal leave of absence without pay from his state employment for not more than two consecutive terms of such office or for a period of four years, whichever is shorter. Upon reapplication for his original position at the expiration of such term or terms of office, such person shall be reinstated in his most recent state position or a similar position with equivalent pay or to a vacancy in any other position such person is qualified to fill. If no such positions are available, such person's name shall be placed on all reemployment lists for classes in which he has attained permanent status. Any person employed in the classified state service or in the judicial department who accepts an elective state office shall resign from such employment upon taking such office. In either event, such person shall give notice in writing to his appointing authority that he is a candidate for a state elective office or a full-time elective municipal office within thirty days after nomination for that office.

Sec. 5-266b. Permitted activity. Nothing contained in sections 5-266a to 5-266d, inclusive, prohibits political activity by such persons in the classified service in connection with (1) an election and the campaign preceding such election if none of the candidates is to be elected at that election as representing a party any of whose candidates for presidential elector received votes in the last-preceding election at which presidential electors were selected; or (2) a question which is not specifically identified with a national or state political party. For the purpose of this section, questions relating to constitutional amendments, referenda, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a national or state political party.

Sec. 5-266c. Regulations. The commissioner of administrative services shall issue such regulations as are necessary and appropriate for administration of sections 5-266a to 5-266d, inclusive.

Sec. 5-266d. Dismissal or suspension of employee. Appeal. If, upon the complaint of any citizen of the state, the commissioner of administrative services finds that any employee in the classified state service has violated any provision of sections 5-266a to 5-266d, inclusive, said commissioner may dismiss such employee from state service. If said commissioner finds that the violation does not warrant removal, he may impose a penalty on such employee of suspension from his position without pay for not less than thirty days nor more than six months. Any employee aggrieved by any action of the commissioner under the provisions of this section may appeal as provided in section 5-202.

Text of Regulations of Connecticut State Agencies § 5-266a-1 (Connecticut State Ethics Commission):

(a) There is a conflict of interests which precludes a person in State service from holding elective municipal office when one or more of the following applies:

(1) The Constitution or a provision of the general statutes prohibits a classified State employee or a person employed in the judicial department from seeking or holding municipal office.

(2) The department or agency in which a classified State employee has an office or position has discretionary power to:

(A) Remove the incumbent of the municipal office;

(B) Approve the accounts or actions of the municipal office;

(C) Institute or recommend actions for penalties against the incumbent of the municipal office;

(D) Regulate the emoluments of the municipal office; or

(E) Affect any grants or subsidies, administered by the State, for which the municipality in which the municipal office would be held is eligible.

(3) A person employed in the classified state service or in the judicial department is required by law or regulation to deal with or assist the incumbent of the municipal office in the execution of the employee's official functions and duties.

(b) There is a conflict of interests which precludes a person employed in the classified state service or in the judicial department from holding elective municipal office when holding such office will either impair his independence of judgment as to his state duties or require or induce him to disclose confidential information acquired by him in the course of and by reasons of his state duties.

(3)

No. 89-1582

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CONNECTICUT, DEPARTMENT OF HUMAN RESOURCES, ET AL., PETITIONERS

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Solicitor General

STUART M. GERSON
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QUESTION PRESENTED

A provision of the Hatch Act, 5 U.S.C. 1502(a)(3), bars a state employee who works in a program receiving federal funds from being a candidate for partisan elective office. The question presented is whether that provision violates the First, Fifth or Tenth Amendment of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1582

STATE OF CONNECTICUT, DEPARTMENT OF HUMAN RESOURCES, ET AL., PETITIONERS

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1A-3A) is unreported. The opinion of the district court (Pet. App. 4A-21A) is reported at 718 F. Supp. 125. The final decisions of the Merit Systems Protection Board (Pet. App. 34A-38A, 55A-60A) are reported at 33 M.S.P.R. 565 and 36 M.S.P.R. 71, and the Board's orders directing the withholding of federal funding (Pet. App. 39A-45A, 61A-67A) are reported

at 35 M.S.P.R. 170 and 36 M.S.P.R. 692. The recommended decisions of the administrative law judge (Pet. App. 22A-33A, 46A-54A) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1990, and the petition for a writ of certiorari was filed on April 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners challenge the constitutionality of the Hatch Act's restrictions on the political activities of certain state employees. The Hatch Act consists of two sets of statutory restrictions on the political activities of public employees. The first applies to federal employees. 5 U.S.C. 7321 *et seq.* The second set, at issue here, applies to employees of state and local agencies that receive federal loans or grants. 5 U.S.C. 1501 *et seq.*[1]

The specific subsection of the Hatch Act involved in this case is 5 U.S.C. 1502(a)(3), which provides that a state or local officer or employee "may not * * * be a candidate for elective office."[2] This pro-

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[1] The Hatch Act applies to a "State or local officer or employee," which is defined to mean an individual employed by a state or local agency "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. 1501(4).

[2] There is an exception permitting a state or local employee to be a candidate in a non-partisan election. See 5 U.S.C. 1503. That exception is inapplicable here.

hibition is much narrower than the predecessor provision that was enacted by Congress in 1940 and sustained by this Court in *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127 (1947), and the provisions that were again sustained in 1973 in *Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). At the time of its enactment and of this Court's decisions, the Hatch Act prohibited employees of state agencies receiving federal funds from "tak[ing] any active part in political management or in political campaigns." Act of Aug. 2, 1939, 53 Stat. 1147, § 12(a), as added by the Act of July 19, 1940, ch. 640, § 4, 54 Stat. 767; see 5 U.S.C. 1502(a)(3) (1970). That earlier version barred a much broader range of political activity, including active campaigning for other candidates in partisan elections and participation in the internal affairs of a political party. See *CSC* v. *Letter Carriers*, 413 U.S. at 578 n.21, 581-595; *Oklahoma* v. *CSC*, 330 U.S. at 144 & n.22. Congress eliminated these additional prohibitions in 1974 [3] in order to "allow[] State and local government employees to participate in political campaign activities" and to "open up the political process to greater numbers of people." H.R. Rep. No. 1239, 93d Cong., 2d Sess. 155 (1974).[4] By contrast, there has been no narrowing

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[3] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 401(a), 88 Stat. 1290.

[4] The Hatch Act also prohibits a state or local officer or employee in a federally funded activity from (1) using his official authority or influence to interfere with or affect the result of a nomination for or election to office, or (2) directly or indirectly coercing or advising another such officer or employee to contribute or lend anything of value to a party, committee or person for political purposes. 5 U.S.C.

of the Hatch Act's corresponding prohibition against federal employees' taking "an active part in political management or in political campaigns." 5 U.S.C. 7324(a)(2).[5]

1502(a)(1) and (2). These additional prohibitions, which have remained unchanged since the Hatch Act was passed, are not at issue here.

[5] Congress recently passed a bill, H.R. 20, 101st Cong., 1st Sess. (1989), that would have narrowed the Hatch Act's restrictions on federal employees as well. 136 Cong. Rec. S5977-S5979 (daily ed. May 10, 1990); *id.* at H3437-H3449, H3471-H3472 (daily ed. June 12, 1990). On June 15, 1990, the President, pursuant to Article I, Section 7, Clause 2 of the Constitution, vetoed H.R. 20. 136 Cong. Rec. H3681-H3682 (daily ed. June 18, 1990). The House repassed the bill over the President's veto on June 20, 1990, *id.* at H3845-H3846 (daily ed. June 20, 1990), but the Senate, on June 21, 1990, failed to repass the bill by the requisite two-thirds majority, *id.* at S8450 (daily ed. June 21, 1990).

As passed by Congress and presented to the President, H.R. 20 would not have made any changes in the prohibitions applicable to state and local employees. Moreover, it would have retained for federal employees the prohibition, at issue in this case, against running for office in a partisan campaign. See proposed 5 U.S.C. 7323(a)(3) (a federal employee may not "run for the nomination or as a candidate for election to a partisan political office"), 136 Cong. Rec. H3437 (daily ed. June 12, 1990). The version of H.R. 20 that was originally passed by the House of Representatives would have allowed federal employees to run for office; it also would have permitted a federal employee to go on leave without pay for that purpose, although it would have prohibited an agency from imposing a leave-without-pay requirement unless the employee's campaign activities interfered with his official duties. H.R. Rep. No. 27, 101st Cong., 1st Sess. 26, 47 (1989); 135 Cong. Rec. H1240, H1267-H1268 (daily ed. Apr. 17, 1989). By contrast, the version of H.R. 20 subsequently passed by the Senate retained the prohibition against a federal employ-

The Hatch Act directs the Special Counsel of the Merit Systems Protection Board (MSPB) to investigate alleged violations by state and local employees and present charges to the MSPB. After a hearing, in which both the employee and the state or local agency may participate, the MSPB must determine whether there has been a violation and whether the violation warrants removal of the employee from his position. 5 U.S.C. 1504, 1505. If the MSPB finds a violation and concludes that removal is warranted, but the employee is not removed within 30 days, the MSPB must order the appropriate federal agency to withhold from the state or local agency an amount of federal grants or loans equal to two years' pay for the employee, and the federal agency must withhold that amount. 5 U.S.C. 1506.

2. a. Petitioner Camillieri began working for petitioner Connecticut Department of Human Resources (DHR) in 1979. In 1983, when Camillieri held the position of Human Resources Chief of Social Work Services in DHR, he was elected to the Hartford City Council. In January 1985, Camillieri was reassigned within the DHR to the position of Acting Chief of the Fair Hearing Unit, where his duties consisted in part of training and supervising hearing examiners who reviewed appeals by individuals who applied to participate in federally funded programs. Pet. App. 7A.

On May 31, 1985, the MSPB's Office of Special Counsel (OSC) informed Camillieri by letter that the Hatch Act prohibited him from seeking reelection to the city council if he remained in his position with DHR. It also warned him that seeking reelection

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ee's running for office, and the House accepted the Senate version.

would be considered a willful violation of the Hatch Act, which could lead to removal from his position. Camillieri nevertheless ran for reelection while remaining on active duty as Acting Chief of the Fair Hearing Unit. Camillieri was defeated in the Democratic primary. Pet. App. 8A, 23A.

In March 1986, the Special Counsel filed a complaint with the MSPB pursuant to 5 U.S.C. 1206(e)(1)(B) and 1504, charging Camillieri with a violation of 5 U.S.C. 1502(a)(3). Pet. App. 25A. DHR participated in the proceedings, as permitted by 5 U.S.C. 1505. The administrative law judge (ALJ) rejected DHR's argument that a state employee should not be penalized if his candidacy is permissible under state law, reasoning that "[i]t would be anomalous to find that the specific language of 5 U.S.C. § 1502(a)(3), forbidding a covered employee's candidacy in a partisan election, could be defeated by a state law or regulation requiring less." Pet. App. 27A-28A. Turning next to DHR's constitutional arguments, the ALJ found that, although couched as an "as applied" challenge, "the tenor of DHR's arguments do not disguise that agency's direct attack on the constitutionality of the Hatch Act," which was beyond the authority of the MSPB to adjudicate. *Id.* at 28A. Finally, the ALJ concluded that removal was an appropriate penalty, inasmuch as Camillieri's violation was substantial, willful, and knowing. *Id.* at 30A-31A.

The MSPB adopted the ALJ's recommended decision and ordered DHR to remove Camillieri from his position. Pet. App. 34A-37A. The MSPB also warned DHR that if it failed to remove Camillieri within 30 days, the MSPB would order the appropriate federal agency to withhold from DHR loans and grants equal to two years' pay for Camillieri.

Id. at 36A n.5. After DHR informed OSC that it would not remove Camillieri, the MSPB ordered the Department of Health and Human Services to withhold federal funds from DHR in the amount of $90,150, the equivalent of two years' pay for Camillieri. *Id.* at 8A-9A, 39A-40A.

b. Petitioner Winkleman was principally employed throughout 1986 as Human Resource Development Senior Representative with DHR. Pet. App. 47a. In that position, Winkleman reviewed and evaluated the management and effectiveness of community and social service programs supported in large part by federal funds. In July 1986, having been endorsed by the Republican Party as a candidate for Probate Judge, Winkleman asked DHR's Personnel Division whether his candidacy might violate the Hatch Act. The Personnel Division sought advice from OSC, which urged Winkleman to withdraw from the race and subsequently sent him a warning letter about his candidacy. Winkleman nevertheless ran for office while remaining an employee of DHR. He was defeated in the general election. *Id.* at 47A-48A.

Thereafter, the Special Counsel filed a complaint with the MSPB charging Winkleman with a violation of 5 U.S.C. 1502(a)(3). The ALJ found that Winkleman's violation was clear and serious, and accordingly recommended that Winkleman be removed from his position. Pet. App. 46A-54A.

The MSPB adopted the ALJ's recommended decision. Pet. App. 55A-60A. It rejected as legally irrelevant Winkleman's contention that there was no evidence that Winkleman abused his state position, because proof of such abuse is not an element of a violation. *Id.* at 57A. The MSPB also rejected Winkleman's argument that under *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985),

the State would be required to hold a hearing prior to terminating him, and that such a hearing would be a sham because the removal decision would already have been made. Observing that this argument "borders on the frivolous," the MSPB pointed out that 5 U.S.C. 1505 afforded Winkleman a right to be heard before the MSPB, and "[n]either *Loudermill* nor the Hatch Act can be interpreted as requiring that the State or local agency conduct a second hearing on the issue of termination if the Board finds that removal of the offending employee is warranted." Pet. App. 57A. The MSPB therefore ordered that Winkleman be removed from his position with DHR and stated that federal funds equalling Winkleman's pay for two years would be withheld if Winkleman was not terminated within 30 days. *Id.* at 58A & n.3. After DHR informed OSC that it would not remove Winkleman, the MSPB ordered the Department of Health and Human Services to withhold $60,896 from DHR. *Id.* at 61A-67A.

3. Pursuant to 5 U.S.C. 1508, petitioners then filed this action for review of the MSPB orders in the United States District Court for the District of Connecticut. The district court granted summary judgment in favor of the MSPB. Pet. App. 4A-21A. It sustained the MSPB's determinations that Camillieri and Winkleman were covered by the Hatch Act; that they had willfully violated the Act (especially since they had received warnings that the Act prohibited their candidacies); and that their violations therefore warranted removal. *Id.* at 18A-20A.

The court also rejected petitioners' constitutional objections. Pet. App. 11A-18A. First, it concluded that the "clear consequence" of this Court's decisions in *United Public Workers* v. *Mitchell*, *Oklahoma* v. *CSC*, *CSC* v. *Letter Carriers* and *Broadrick* v. *Okla-*

homo "is that infringements upon the ability of government employees, be they federal or state, to be candidates for elective office do not violate the First Amendment." Pet. App. 16A. Second, the court concluded that *Oklahoma* v. *CSC* required rejection of petitioners' Tenth Amendment claim that the Hatch Act impermissibly interferes with state sovereignty, and indeed the court noted that petitioners "appear to concede as much." Pet. App. 16A. The court also pointed out that 5 U.S.C. 1502(a)(3) has been amended since the decision in *Oklahoma* v. *CSC* in a manner that renders it "less restrictive" and therefore presents "even less of a claim for a Tenth Amendment violation than the argument rejected by the Supreme Court in *Oklahoma*." Pet. App. 16A-17A.

Finally, the district court rejected petitioners' argument that the Hatch Act denies Camillieri and Winkleman equal protection of the laws because it allows certain other state and local officers and employees[6] to be candidates for office in a partisan campaign. Pet. App. 17A-18A. The court noted that *Broadrick* v. *Oklahoma* had rejected a similar equal protection objection to a state statute that barred employees in the "classified" but not the "unclassified" civil service from engaging in political activities, 413 U.S. at 607 n.5, and it could see "no reason why the distinctions between Camillieri and Winkleman on the one hand, and the kinds of state employees not covered on the other hand, are not within the leeway envisaged by *Broadrick*." Pet. App. 18A.

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[6] The Governor or Lieutenant Governor of the State, the mayor of a city, individuals holding public office, state employees outside the executive branch, and individuals employed by certain educational and research institutions. See 5 U.S.C. 1501(2), 1501(4)(B) and 1502(c).

4. The court of appeals affirmed in a brief unpublished order, Pet. App. 1A-3A, relying on the "well-stated reasons" given by the district court. *Id.* at 3A. Like the district court, the court of appeals recognized that it was not free to disregard this Court's "definitive rulings" in *United Public Workers* v. *Mitchell*, *Oklahoma* v. *CSC*, and *CSC* v. *Letter Carriers* that the Hatch Act does not violate the First or Tenth Amendment, or the Court's holding in *Broadrick* v. *Oklahoma* that a similar limitation on the coverage of such a prohibition does not deny covered employees equal protection of the laws. *Id.* at 3A.

ARGUMENT

Petitioners do not challenge the MSPB's determinations that Camillieri and Winkleman committed willful violations of the Hatch Act and that their violations warranted removal from their positions under 5 U.S.C. 1505(2). Petitioners do contend that the MSPB's orders violate the First and Tenth Amendments and deny Camillieri and Winkleman the equal protection of the laws. The court of appeals correctly rejected those contentions, and those rulings do not conflict with any decision of this Court or another court of appeals.

Indeed, as petitioners concede, this case is controlled by the Court's rejection of essentially identical claims in *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *Oklahoma* v. *CSC*, 330 U.S. 127 (1947); *CSC* v. *Letter Carriers*, 413 U.S. 548 (1973); and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).[7]

[7] Petitioners say (Pet. 10 n.10) they are challenging the Hatch Act only as applied in the circumstances of this case. Nothing in their legal position is so limited, however, since they make no argument addressed to their particular circum-

Recognizing the obstacles posed by these decisions, petitioners ask the Court to reconsider them. The Court has stated, however, that "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). Petitioners do not, and cannot, offer any such special justification here. To the contrary, the Court has reaffirmed those First Amendment and equal protection rulings in the specific context of a prohibition against a public official's running for office in *Clements* v. *Fashing*, 457 U.S. 957 (1982), and it has expressly reaffirmed the Tenth Amendment analysis of *Oklahoma* v. *CSC* in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). The petition for a writ of certiorari therefore should be denied.

1. In *United Public Workers* v. *Mitchell*, the Court rejected the argument that the Hatch Act's prohibition against "taking an active part in political management and political campaigns" violates the First Amendment rights of federal employees, holding that "Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action." 330 U.S. at 102. The Court explained (*id.* at 103):

> When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the

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stances. Indeed, the fact that petitioners are asking the Court to reconsider governing legal principles confirms that they are making a facial challenge to the Act.

> answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.

In *Oklahoma* v. *CSC*, decided the same day, the Court held that the decision in *United Public Workers* v. *Mitchell* required rejection of a First Amendment challenge to the identical Hatch Act provision applicable to state employees. 330 U.S. at 142.

This Court "unhesitatingly reaffirm[ed]" *United Public Workers* v. *Mitchell* in *CSC* v. *Letter Carriers*, 413 U.S. at 556. There, the Court recognized that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" 413 U.S. at 564 (quoting *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968)). The Court therefore held that "[a]lthough Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act." 413 U.S. at 564. And of particular significance here, the Court also specifically stated that an Act of Congress forbidding such activities as "becoming a candidate for, or campaigning for, an elective public office" would "unquestionably be valid." *Id.* at 556.

Petitioners ask this Court to reconsider these decisions in light of more recent precedents that have applied "strict scrutiny" in resolving certain First Amendment and equal protection claims. See Pet. 11-12 (citing *Tashjian* v. *Republican Party*, 479 U.S. 208, 217 (1986); *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256

(1986); and *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)). None of those decisions, however, concerned public employees. In recent cases involving the First Amendment rights of public employees, the Court has continued to use the *Pickering* balancing test. See *Rankin* v. *McPherson*, 483 U.S. 378, 383-384 (1987); *Connick* v. *Myers*, 461 U.S. 138, 140 (1983).[8] Petitioners have offered no good reason why that approach should be abandoned here.

Moreover, this case involves only a prohibition against a public official's becoming a candidate for office in a partisan election while retaining his position. Since the Court rendered the decisions in *Letter Carriers* and *Broadrick*, it has *unanimously* sustained such a prohibition in *Clements* v. *Fashing*, 457 U.S. 957, 972 (1982); *id.* at 990 n.12 (Brennan, J., dissenting). Further review of petitioners' First Amendment challenge to the essentially identical provision here is therefore not warranted.[9]

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[8] In *Rutan* v. *Republican Party of Illinois*, No. 88-1872 (June 21, 1990), the Court dealt with decisions by a governmental employer to hire, transfer, promote, or recall employees on the basis of the employees' political affiliations, and held that the First Amendment protects against discrimination among employees or applicants for employment on that basis. But the Court was careful to distinguish its treatment of such political patronage practices from instances where (as in the Hatch Act) the government "takes measures to ensure the proper functioning of its internal operations." Slip op. 7 n.4; see also *id.* at 6-11 & n.3 (Scalia, J., with Rehnquist, C.J., and O'Connor & Kennedy, J.J., dissenting).

[9] Petitioners do not articulate the basis for their equal protection objection, which they mention only in passing (Pet. 11). They do pose the rhetorical question (Pet. 12): "Why should state employees have less ability to fully participate in the political process, on their own time, than all other mem-

2. Petitioners also argue (Pet. 13-16) that the Hatch Act provisions at issue here impermissibly intrude into the internal affairs of the State, in violation of the Tenth Amendment. Petitioners concede (Pet. 14) that this Court's decision in *Oklahoma* v. *CSC* "determines that the Hatch Act does not violate the Tenth Amendment," but they ask (Pet. 15) that that decision be reconsidered because it was rendered before *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); and *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Moreover, in view of the holding

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bers of society?" The assumptions underlying this question are wrong. First, the Hatch Act does not apply to all state employees. As previously noted, the Act applies only to individuals "employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. 1501(4). Second, the restrictions on federal employees are greater than those on state employees. See pages 3-4 and note 5, *supra*; *Bauers* v. *Cornett*, 865 F.2d 1517, 1523 (8th Cir. 1989).

Moreover, in *Broadrick*, the Court upheld a state statute similar to the Hatch Act against an equal protection challenge based on the fact that it applied to employees in the "classified" service but not the "unclassified" service. 413 U.S. at 607 n.5. Similarly, in *Clements* v. *Fashing*, the majority rejected a similar equal protection challenge to state constitutional provisions that limited the eligibility of certain public officials to run for office. 457 U.S. at 966-971; *id.* at 973-976 (Stevens, J., concurring in part and concurring in the judgment). The limitations and exemptions in the Hatch Act, cited by the district court, Pet. App. 17A-18A (see page 9 and note 6, *supra*), are clearly valid under these equal protection rulings.

in *Garcia* (that the Tenth Amendment does not prohibit application of the Fair Labor Standards Act to a public mass-transit authority), petitioners "are also asking this Court to seriously consider whether its determination in *Garcia* be limited or overruled." Pet. 15. All of the intervening decisions upon which petitioners rely, however, involved direct regulation of governmental activities through statutes enacted by Congress under the Commerce Clause, Art. I, § 8, Cl. 3. The provisions of the Hatch Act at issue here (and in *Oklahoma* v. *CSC*), by contrast, were enacted pursuant to Congress's distinct power to spend money to "provide for the * * * general Welfare of the United States," Art. I, § 8, Cl. 1.

In *Oklahoma* v. *CSC*, the Court explained that "[w]hile the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have the power to fix the terms upon which its money allotments to the states shall be disbursed." 330 U.S. at 143. In sustaining the Hatch Act's restrictions on the political activities of state employees in federally funded programs, the Court continued (*ibid.*):

> The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid.

The Court's conclusion in *Oklahoma* v. *CSC* that the Hatch Act does not violate the Tenth Amendment is entirely consistent with this Court's most recent Spending Clause case, *South Dakota* v. *Dole*, 483

U.S. 203 (1987), which petitioners do not even cite. Indeed, *South Dakota* v. *Dole* discusses with approval and follows the Tenth Amendment analysis of *Oklahoma* v. *CSC*. See 483 U.S. at 206-207, 210; accord *id.* at 212, 217 (O'Connor, J., dissenting). In light of the Court's recent and unanimous reaffirmation of *Oklahoma* v. *CSC*, there is no reason for the Court to reconsider it here. That is especially so because Congress has narrowed the relevant Hatch Act provision since *Oklahoma* v. *CSC* was decided. As the district court pointed out, "the amended [Section] 1502(a)(3) (prohibiting 'be[ing] a candidate for elective office') is less restrictive than the old provision (prohibiting 'tak[ing] an active part in political management or in political campaigns'), and therefore presents even less of a claim for a Tenth Amendment violation than the argument rejected by the Supreme Court in *Oklahoma*." Pet. App. 16A-17A.

This conclusion is buttressed by the carefully tailored nature of the remedy imposed under the Hatch Act in this case. Once the MSPB found that Camillieri and Winkleman had committed willful violations of the Act that warranted their removal, DHR had two options: it could comply with the MSPB's order by removing the two willful violators, or it could face the withholding of federal funds in an amount equal to two years' salary for those violators. DHR chose the latter course, which resulted in the withholding of approximately $150,000 in federal financial assistance. That was a "relatively small percentage" of the federal financial assistance DHR received (compare *South Dakota* v. *Dole*, 483 U.S. at 211), which, in 1986, totalled approximately $60 million. Pet. App. 47a. This limited consequence

does not impermissibly intrude upon the State's sovereignty.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioners also contend (Pet. 14 n.12) that *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 432 (1985), requires that the individual employees be afforded hearings before they are removed from their positions and that it would be difficult for a State to complete that process within 30 days of a decision by the MSPB. Thus, petitioners assert that the State would be confronted with the dilemma of either losing federal funds or violating the employees' due process rights. This argument is meritless. If we assume that the individual employees have a protected interest in their jobs, all that *Loudermill* requires is that they be given some kind of a hearing prior to termination. Under the Hatch Act, petitioners had a right to a hearing before the MSPB, 5 U.S.C. 1505, and they have not challenged the constitutional adequacy of that hearing. Nothing in *Loudermill* suggests that the State would be required to hold a second hearing prior to removing the individual employees from their positions on the basis of the MSPB's decision.

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